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**A** ENVIRONMENTAL  
TOBACCO SMOKE

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## ENVIRONMENTAL TOBACCO SMOKE (3/90)

### STATUS

Environmental Tobacco Smoke (ETS) (a.k.a. "passive smoking," "second-hand smoke," "sidestream smoke" and "involuntary smoking") has been a legislative issue since 1975, when eight states enacted restrictions on smoking in public places other than elevators. These early smoking restrictions were motivated primarily by annoyance claims, rather than by the issue of chronic disease. However, the anti-smokers and media attention given to the alleged effects of ETS on health have since played a role in motivating 44 states, over 600 localities, and hundreds of businesses to restrict smoking in the workplace and other public places.

On the federal level, several smoking restrictions have been implemented. For example, in October 1989 Congress expanded and extended a two-year, two-hour airline smoking ban to include all flights of six hours or less, essentially banning smoking on all scheduled flights within the domestic United States. In 1987, the General Services Administration imposed restrictions on its 890,000 employees in 6,800 government buildings. In May 1987, the Department of Health and Human Services banned smoking in the buildings its 120,000 employees occupy.

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## SUMMARY ARGUMENTS

A review of the scientific literature on ETS indicates that it has NOT been conclusively associated with chronic disease. Most of the studies alleging an ETS/Nonsmoker health risk have been criticized for three fundamental flaws: 1) selection bias: the use of inaccurate, unverifiable information from research participants; 2) misclassification of variables, such as diet and occupation, which are present and unaccounted for in a number of the studies; and 3) failure of the studies to use a standard method for measuring exposure to ETS.

### **I    ETS: THE SCIENCE**

1. **Much Of The Published Data Do Not Sufficiently Support The Notion That ETS Is Associated With Chronic Disease In Nonsmokers.** More than 80 scientists from over 20 countries gathered at the International Symposium on Environmental Tobacco Smoke held at McGill University in Montreal, Canada on November 3 and 4, 1989. Upon review of available data on ETS, including the 1986 Surgeon General's Report, the co-organizers of the symposium concluded that the data do not prove ETS is associated with health effects.<sup>1</sup> Moreover, various presenters concluded that:

- The claim that ETS increases the risk of lung cancer cannot be supported by the inconsistent data that is available. Of the 23 epidemiologic studies dealing with ETS in relation to lung cancer, 18 reported no statistically significant risks.<sup>2</sup>
- "[I]t has not been demonstrated that exposure to ETS increases the risk of cardiovascular disease." Of seven studies dealing with ETS in relation to heart disease, 4 showed no significant risk while only two showed risk levels more than 2.0. (Levels of 2.0 and below are considered weak by experts.)<sup>3</sup>

However, all the studies failed to control for at least one or more important variables such as, "... blood pressure, diet, alcohol consumption, plasma cholesterol, body weight, socioeconomic status..."<sup>4</sup> which may contribute to increase risk.

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<sup>1</sup>"Environmental Tobacco Smoke," Proceedings of the International Symposium at McGill University, 1989. p. 375.

<sup>2</sup>Ibid. p. 100.

<sup>3</sup>Ibid. pp. 139-142.

<sup>4</sup>Ibid. p. 152.

- The risk assessment techniques used in the existing ETS data are not reliable, and inferences drawn from them would be based on incorrect assumptions and inadequate data.<sup>5</sup> For example, the National Research Council (1986) report on ETS and lung cancer based their conclusions on a combination of studies from Europe, Asia, and North America which had extensive cross-cultural differences. The comparability of these studies is not possible. It creates an inaccurate assessment of risk, due to "social and demographic" differences between these populations.<sup>6</sup>
  - ETS is not synonymous with indoor air pollution - improper ventilation along with various other non-tobacco sources are the leading causes of complaints. Only "about 3 percent" of indoor air quality complaints in "sick buildings" are attributable to ETS.
2. ETS Has Not Been Scientifically Proven To Be A Risk Factor In The Workplace. On September 1, 1989, the Occupational Safety and Health Administration (OSHA) denied a petition by the Action on Smoking and Health (ASH) to ban or restrict smoking in the workplace, saying the available data, "... do not definitively establish a "grave danger" from environmental tobacco smoke (ETS) at current workplace exposure levels."<sup>8</sup>
  3. ETS As A Risk Factor For Cervical Cancer Is Deemed Premature. ...the classification of passive smoke exposure as a risk factor for cervical cancer seems premature."<sup>9</sup> In 1989, physicians with the American Health Foundation released this statement following their review of a report by Dr. Martha Slattery, MPH University of Utah, entitled "Cigarette Smoking and Exposure to Passive Smoke are Risk Factors for Cervical Cancer."

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<sup>5</sup>Ibid. p. 301.

<sup>6</sup>Ibid. p. 295.

<sup>7</sup>Ibid. p. 333.

<sup>8</sup>"ASH Drops Suit On ETS Rule; OSHA To Study Workplace Ban," Indoor Air Pollution News, September, 1989.

<sup>9</sup>"Exposure to Cigarette Smoke and Cervical Cancer," Journal of the American Medical Association, July 28, 1989.

4. **Exposure To ETS And An Increase In The Risk Of Lung Cancer Has Not Been Scientifically Proven.** Neither the reports of the National Academy of Sciences (NAS) nor the Surgeon General demonstrate a valid relationship between chronic exposure to ETS and an increased incidence of lung cancer. "The lung cancer studies published since these reviews have the same limitations as the previous studies, and little has been published since 1986 that adequately addresses the issues of exposure and misclassification."<sup>10</sup> Surveying virtually the same epidemiologic evidence considered by NAS and the Surgeon General, the International Agency for Research on Cancer of the World Health Organization (WHO) concluded that the available epidemiological evidence is inconsistent, allowing for the possibility of no increased risk.<sup>11</sup>
5. **Exposure To ETS Is Insignificant.** A 1987 ETS study in Dallas by the International Technology Corporation concluded that to be exposed to the equivalent of one cigarette, a person must spend:
- 264 consecutive hours (11 full days) in an office building;
  - 398 consecutive hours (16-1/2 full days) in a restaurant;<sup>12</sup>
  - 224 consecutive hours (9-1/3 full days) in the nonsmoking section of a commercial airliner.<sup>13</sup>
6. **Whether ETS Has Any Health Effect On Nonsmokers Remains An Open Question.** As early as 1983 and 1984, 65 internationally known physicians and scientists met three times to address the health effects of passive smoking. They stated:

March 1983 - Co-organizers of an international conference on ETS at the University of Geneva concluded: "An overall evaluation based upon available scientific data leads to the

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<sup>10</sup>Holcomb, C. Larry, Ph.D. "Response To: An Estimate of Adult Mortality in the United States from Passive Smoking. Environment International, 14: 249-265," January 20, 1989.

<sup>11</sup>"Environmental Carcinogens Methods of Analysis and Exposure Measurement," The World Health Organization, 1987.

<sup>12</sup>"Environmental Tobacco Smoke Survey," International Technology Corporation, August 4, 1987.

<sup>13</sup>International Technology Corporation, June 1986.



conclusion that an increased risk [of lung cancer] for nonsmokers from [environmental tobacco smoke] exposure has not been established."<sup>14</sup>

1983 - The National Institutes of Health determined that the possible health effect of ETS on the respiratory system "varies from negligible to quite small."<sup>15</sup>

April 1984 - Co-organizers at a workshop in Vienna, Austria, concluded: "Should lawmakers wish to take legislative measures with regard to passive smoking, they will, for the present, not be able to base their efforts on a demonstrated health hazard from passive smoking."<sup>16</sup>

## II. ETS: INDOOR AIR QUALITY

1. **Improper Ventilation Rates, Not Smoking, Are The Major Factors Of Passenger And Crew Discomfort Aboard Aircrafts.** According to a 1989 Department of Transportation (DOT) study, increased ventilation could bring CO<sub>2</sub> closer to specified guidelines. "Such an approach, or increased ventilation, could also reduce levels of other potentially hazardous chemicals, such as volatile organic compounds that were not measured during this study."<sup>17</sup>

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<sup>14</sup>Rylander, R., (ed.), Environmental Tobacco Smoke Effects on the Nonsmoker: Report From A Workshop, Scand Journal of Respiratory Disorders, Suppl., 133(65), 1984.

<sup>15</sup>U.S. Department of Health and Human Services, Public Health Service, National Institutes of Health, "Report of Workshop on Respiratory Effects of Involuntary Smoke Exposure: Epidemiologic Studies, May 1-3, 1983," December 1983.

<sup>16</sup>Valentin, H. and E. Wynder, "Health Danger Through Passive Smoking Not Proven: Physicians View on Passive Smoking," (Press release for Symposium on "Passive Smoking from a Medical Point of View," April 9-12, 1984, Vienna, Austria).

<sup>17</sup>Nagda, N.L., et al., "Airliner Cabin Environment: Contaminant Measurements, Health Risks, And Mitigation Options," GEOMET Technologies, Inc., December 1989. p. 10-9.

Components of ETS were determined by the study to be minimal in areas bordering smoking sections and virtually nonexistent in nonsmoking sections of aircrafts.<sup>18</sup>

2. **There Is No Conclusive Evidence To Prove That Federal Employees Who Do Not Smoke, Should Be Eligible For Hazardous Duty Pay If They Are Exposed To ETS.** The Federal Service Impasse Panel rejected a union proposal which would have made non-smoking federal employees eligible for hazardous duty pay for being exposed to ETS.<sup>19</sup> On August 16, 1989, the impasse ruled in favor of a more reasonable solution which would designate certain areas for smoking, accommodating smokers and nonsmokers alike.
3. **Prohibiting Smoking Does Not Reduce The Symptoms Of Sick-Building Syndrome.** A 1987 report written by Theodore D. Sterling, Ph.D., Canadian professor of environmental issues, stated "...prohibition of smoking has not been shown to have any measurable effect on either indoor air quality or associated health and comfort symptoms of sick building syndrome."<sup>20</sup>
4. **Only 2 Percent Of Reported Indoor Air Complaints Are Linked To Smoking.**<sup>21</sup> In 1987, the federal government's National Institute Of Occupational Safety and Health (NIOSH) inspected 356 buildings for indoor air complaints, and reported nearly 50 percent of complaints were caused by inadequate ventilation.
5. **The Presence Of ETS Is Really A Symptom Of A Larger Problem: That Of Poor Indoor Air Quality In General, Also Known As Sick-Building Syndrome.** Many invisible, noxious substances are trapped indoors by poor ventilation, among them, ozone, asbestos, fiber glass, bacteria, fungi, carbon monoxide, and formaldehyde. Since ETS is visible, it is assumed to be the sole culprit. Moreover, banning smoking has not been shown to have any measurable effect on indoor air quality.

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<sup>18</sup> Ibid. p. xxiii.

<sup>19</sup> "Exposure to Smoking Not 'Hazardous Duty'," Federal Service Impasse Panel Newsletter, September 1989.

<sup>20</sup> Sterling, T. D., et al., "Environmental Tobacco Smoke And Indoor Air Quality In Modern Office Work Environments," Journal of Occupational Medicine, January 1987.

<sup>21</sup> Melius, James, M.D. et al. "Indoor Air Quality—The NIOSH Experience," 1984. p. 17.

A BRIEF LEGISLATIVE HISTORY OF ETS (3/90)

The Health Consequences of Involuntary Smoking: A Report of the Surgeon General, issued in 1986, is the first report of the Surgeon General "that identifies a chronic disease risk resulting from exposure to tobacco smoke for individuals other than smokers."<sup>1</sup> As early as the 1970's, however, concerns over ETS were used to justify government-imposed smoking restrictions.

The scope of such restrictions, narrow at first, has broadened over the years. States and an increasing number of localities have moved from regulating smoking in public conveyances and other common areas to restricting smoking in the private workplace and restaurants, to outright bans on smoking. Activity in the states appears to have peaked in 1989, while local activity peaked in 1987.

TABLE 1 - TOTAL NUMBER OF SMOKING RESTRICTION BILLS

	STATE		LOCAL		TOTAL	
	Intr.	Appr.	Intr.	Appr.	Intr.	Appr.
1979	114	8	58	23	172	31
1980	98	1	60	32	149	33
1981	100	10	65	35	165	45
1982	86	4	79	42	165	46
1983	86	5	120	62	206	67
1984	109	4	180	65	289	69
1985	142	26	232	114	374	140
1986	140	17	255	139	395	156
1987	191	28	301	169	492	197
1988	189	18	253	123	411	130
1989	193	32	175	111	368	143

Source: The Tobacco Institute

<sup>1</sup>"The Health Consequences of Involuntary Smoking: A Report of the Surgeon General," U.S. Department of Health and Human Services, 1986. p. ix.

Table 1 shows that from 1979 to 1989, the number of smoking restriction bills introduced in the states increased by 69%. Between 1988 and 1989, the rate of bills introduced increased by 2%. The rate of approval for these bills increased from 7% to 17% between 1979 and 1989. Between 1988 and 1989, the rate of approval increased from 10% to 17%.

The figures for bills introduced in the localities from 1979 to 1987 reflect a sharp increase of 419%, while the number fell from 1988 to 1989 by 45%. The approval rate increased from 40% in 1979 to 63% in 1989.

TABLE 2 - BREAKDOWN BY BILL SUBCATEGORIES

	Priv Wk. Pl.		Govt Wk. Pl.		Rest.		Public Pl. *	
STATE	Intr.	Appr.	Intr.	Appr.	Intr.	Appr.	Intr.	Appr.
1985	36	3	39	7	43	4	165	19
1986	52	3	58	6	55	2	179	10
1987	58	3	66	10	68	6	210	27
1988	58	4	55	4	58	2	116	9
1989	49	4	54	7	63	6	88	13
LOCAL	Intr.	Appr.	Intr.	Appr.	Intr.	Appr.	Intr.	Appr.
1985	91	52	120	67	118	68	379	205
1986	112	56	155	86	155	80	459	261
1987	133	70	200	115	169	88	524	295
1988	112	49	174	84	141	63	201	99
1989	61	33	107	70	76	46	89	51

\* Public Places include commercial establishments, publicly owned buildings, outdoor areas, and other public areas.

Source: The Tobacco Institute

Table 2 shows that for each category, the number of state bills approved in 1989 increased from 1988, with the exception of private workplace bills.

At the local level, the number of bills introduced and approved have continued to decrease since 1987. The number of approved bills are at their lowest level since 1985, in every category except for Government Work Place.

#### FEDERAL EFFORTS ON SMOKING RESTRICTIONS

Three smoking restrictions have passed at the federal level:

- Congress passed the Department of Transportation bill HR3015 which includes a provision that permanently expands and extends the previous two-year, two-hour airline smoking ban to include virtually all domestic flights. The bill went into effect on February 25, 1990.
- In 1988, the Appropriations Committee directed Amtrak to survey their passengers concerning smoking and report back to the committee by 3/1/89. The results showed that some 80 percent of the non-smoking passengers surveyed rated the availability of nonsmoking areas as good or excellent.
- The Durbin amendment (a two-hour airline smoking ban) and the Mrazek amendment (a Long Island Railroad smoking ban) to the transportation appropriations bill (HRJ395) became law when Congress passed the 1987 continuing resolution (12/22/87).

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## WORKPLACE SMOKING RESTRICTIONS (3/90)

### STATUS

Currently, twenty-eight states and approximately 285 localities have enacted laws governing smoking in the workplace. According to the Administrative Management Society's 1988 survey of companies varying in employee size (1 - 10,000 plus), an average 60% of those surveyed had an official smoking policy.<sup>1</sup>

Among private businesses a 1987 Bureau of National Affairs Survey<sup>2</sup> indicated:

- 54% of the 623 employers surveyed reported having a workplace smoking policy;
- 21% were considering such a policy;
- 12% had banned all smoking at the workplace;
- 51% had banned smoking in all open areas;
- 33% had banned smoking in all private offices;
- 5% of the companies allowed preference to be given to hiring nonsmokers, and 1% hired only nonsmokers

Over 200 pieces of legislation are annually considered by states and localities to restrict smoking in the workplace. In the states, about 89% are rejected and the few that pass generally require businesses to have a policy—any policy—on smoking. In the localities, about 61% of the legislation passes, and it is often much more stringent than the state proposals.

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<sup>1</sup>"1988 AMS Smoking Policies Survey", Administrative Management Society Foundation, 1988.

<sup>2</sup>"Where There's Smoke: Problems and Policies Concerning Smoking in the Workplace," Bureau of National Affairs, 1987. pp. 18-24.

### SUMMARY ARGUMENTS

Restricting smoking in the workplace is bad public policy and bad business policy.

1. **Restrictions May Lead To Job Discrimination.** Smoking is most often restricted in open areas where clerical workers (usually women and minorities) are employed, while managerial personnel in private offices are exempt.
2. **Lower Employee Morale And Increased Dissension Result From Restrictions.** By focusing attention on smoking, such restrictions create tensions and conflicts. Often conflicts, which are ostensibly smoking-related, are in fact manifestations of more profound interpersonal problems. Policies targeted on smoking treat a symptom of the deeper problem, not the problem itself.
3. **Restrictions In The Workplace Interfere With Labor-Management Relations.** Working conditions have long been an issue subject to labor-management negotiations in the same way as wages, hours, and benefits are. Arbitrary smoking rules, whether imposed by government or a distant corporate headquarters, disrupt the long-established freedom of labor to settle issues in the normal course of contract negotiation.
4. **Restrictions Interpose The Employer As A Policeman Between Employees And Between Unions And Their Membership.** An employer should concentrate on providing a good-quality product or service in an efficient manner with an eye on the marketplace. Forcing management to enforce smoking rules interferes with these goals and weakens our economic system.
5. **Restrictions Usurp The Traditional Role Of Unfettered Business Decision-Making In The Free Marketplace.** Businesses are best able to determine the smoking policies that suit smoking and nonsmoking employees and customers without government interference. According to an October 1989, survey on smoking issues by the Tobacco Institute, of the 1,500 adults questioned, 66% "support the 'middle' position of having employers and employees 'decide when and where smoking is permitted'."

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<sup>3</sup>"October Survey on Smoking Issues," Frederick/Schneiders, Inc., November 16, 1989.

7. **Restrictions May Impose Significant Costs And Inefficiencies On Employers.** In attempting to comply with some workplace smoking laws, employers may be forced to remodel work areas and relocate personnel. Such structural changes can mean significant expenditures, while relocating employees away from the rest of their work group increases inefficiency and decreases morale.
8. **Restrictions Reportedly Do Not Reduce Costs Or Increase Productivity.** In 1989, the National Chamber Foundation of the U.S. Chamber of Commerce released a study, "Determinants of Employee Absenteeism", which analyzed absenteeism related to lifestyle variables. The study concluded that smoking proved to have no significant effect on absenteeism.<sup>4</sup> Moreover, a 1987 Bureau of National Affairs (BNA) Survey stated that only 5% of the respondents reported financial savings from banning smoking, 3% reported a decrease in productivity after implementing a smoking policy, and the vast majority, 89%, reported no effect.
9. **Restrictions Overlook Many Important Issues.** In their efforts to offer at least one kind of health promotion activity for employees, firms may be diverting funds away from more pressing health concerns such as the prevention of occupational hazards. According to Charles Levenstein, a professor of work environment policy at the University of Lowell, "One form of [industry] resistance to regulation has been to redefine health issues as problems of individual behavior rather than environmental hazard or corporate economic activity."<sup>5</sup> Other worker safety issues such as injury prevention, and exposure to toxic substances are often ignored because prevention of these hazards is of substantial cost to industry.

A survey by the Washington Legal Foundation (11/3/88) indicated that only 2% of human resource managers cite smoking as an area of concern, and placed their concerns such as morale, quality, and recruitment at the top of the list.<sup>6</sup>

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<sup>4</sup> Bonilla, Carlos E., "Determinants of Employee Absenteeism," National Chamber Foundation, June 1989.

<sup>5</sup> "Toxic Materials News," February 1, 1989.

<sup>6</sup> "A Survey of Personnel Policies in the Workplace," Washington Legal Foundation, November 1988.



10. **Restrictions Are Not Based On Compelling Scientific Evidence.**  
The Occupational Safety and Health Administration denied a petition submitted by ASH to restrict smoking in the workplace stating "...data do not definitely establish a 'grave danger' from environmental tobacco smoke (ETS) at current workplace exposure levels." OSHA also stated that ASH did not meet, "...the stringent statutory criteria for issuance [of a standard]."

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<sup>7</sup>"ASH Drops Suit On ETS Rule; OSHA To Study Workplace Ban,"  
Indoor Air Pollution News, September, 1989.

## DISCRIMINATORY HIRING PRACTICES (3/90)

### STATUS

To date, only four states have adopted laws permitting employers to discriminate against smokers in their hiring policies. The most recent state smoker discrimination legislation which concerns police and firefighters, was adopted in Kansas in 1989. Also adopted in 1989, was legislation in Florida requiring new firefighters to have been non-users of tobacco at least one year before hiring. The Massachusetts State Legislature adopted legislation requiring all public safety personnel hired after 1/1/88 to be nonsmokers. In 1986, an executive order was issued by the Governor of North Dakota approving the Department of Health's hiring policy, giving preference to nonsmokers for departmental jobs. In other states, anti-smoker proposals are still pending (California, Connecticut, and Minnesota).

To date, 74 discriminatory hiring proposals have surfaced in localities around the country. Fifty-four policies have been adopted while twenty were defeated. Many were initiated by administrative policies, while others were approved through the adoption of local ordinances. These policies either require future employees to be nonsmokers or promote preferential hiring of nonsmokers. In 1977, Alexandria, Virginia, became the first locality to implement a policy requiring newly hired police officers to be nonsmokers.

### ANTI-DISCRIMINATORY EMPLOYMENT POLICIES

Approximately 25 bills concerning employment and hiring practices have been considered in 16 states. In 1989, two pieces of legislation protecting smokers rights<sup>1</sup> were adopted at the state level. The Oregon legislature approved a provision prohibiting employers from requiring employees to refrain from smoking off-the-job. Virginia adopted a bill which prohibits governments from requiring applicants or employees from smoking or using tobacco outside the workplace.

In a 1989 analysis of legislation, the Tobacco Merchants Association (TMA) found that a large percentage of smokers rights<sup>1</sup> bills that were introduced became law. While such bills accounted for only 4.5% of 1989 tobacco legislation introduced, they accounted for 10.6% of all enacted bills. The number of proposed bills to prohibit discrimination against an employee because of smoking/nonsmoking preferences, outnumbered discriminatory bills by more than two to one.

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<sup>1</sup>Legislative Bulletin, Tobacco Merchants Association, January 25, 1990.

### LEGAL BATTLES

As of May 1, 1988, 25 court and arbitration cases throughout the United States involved smoker discrimination in the workplace. One had an outcome in favor of the employer, while 9 favored smoking employees. Over half of the cases that favored smokers occurred before 1985. The other 15 cases were either settled out of court or are still pending.<sup>2</sup>

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<sup>2</sup>The Bureau of National Affairs, ENA PLUS Division, 1988.

## SUMMARY ARGUMENTS

1. **Americans Clearly Believe In Employee Privacy.** According to a national poll released January 9, 1990 by the National Consumers League, an overwhelming majority of adults surveyed said that the boss has no right and no business asking questions about the private lives of job applicants; basing hiring and firing on what employees do on<sup>3</sup> their own time; or attempting to change employee lifestyles. It was found that:
  - 74% said an employer has no right to ask employees if they smoke off the job?
  - 76% felt the employer has no right to refuse to hire a smoker.
  - 74% felt the employer has no right to require an employee or job applicant to quit smoking.
2. **Legal, Avocational Activities Unrelated To Job Performance Are An Individual's Business And Need To Remain Protected From Employer Intrusion.** By hiring only smokers, employers encourage intolerance, prejudice, and small-mindedness, and help pave the way for even more intrusive invasions into the private lives of employees.
3. **The Decision Not To Hire Smokers Is Discriminatory.** The Commissioner of the Minnesota Department of Human Rights, Stephen W. Cooper, stated that an attempt by DCA Inc. of Minnetonka not to hire smokers was "...an illegal discriminatory practice to deny employment or terminate any person solely because of a disability or perceived disability."<sup>4</sup>
4. **Only Reasonable Risk Or Lack Of Qualifications Directly Relating To Job Performance Should Be Grounds For Employee Dismissal.** The intrusion into people's behavior away from the workplace and in matters unrelated to work is not based upon any job necessity. The burden of proof also must be on the employer.

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<sup>3</sup>"Whose Business Is It Anyway?," National Consumers League, Released by the ICR Research Group, January 9, 1990.

<sup>4</sup>"Employer's Policy That It Will Not Hire Anyone Who Smokes Violates Minnesota Human Rights Act," NEWS from the Minnesota Department of Human Rights, June 1, 1988.

## RESTAURANT SMOKING RESTRICTIONS (3/90)

### STATUS

Currently, 24 states and more than 300 localities have enacted laws to restrict smoking in restaurants. In 1989, 76 local restaurant smoking restriction bills were introduced, of which 46 (61%) passed. In the states, 6 of 63 bills introduced in 1989 passed (almost 10%).

### COMMENTS

In general, the Gallup survey illustrates that, for most people, smoking is not of primary importance when dining out. The quality of food and service are. Also, most people are content with current arrangements since they don't feel compelled to seek out no-smoking sections.

Two important survey results need to be highlighted:

1) Many more people than just those who smoke have no preference between sections, suggesting that the scope of government legislation is out of proportion to most people's perception of the situation.

2) The Beverly Hills Experience — The survey also suggests that severe restrictions will be bad for business. Reality has already borne this out: when Beverly Hills, California, banned smoking in its restaurants, business declined by 12 to 30 percent (implying a \$3 million/year loss in business), workers were laid off, and proprietors had trouble enforcing the law. Finally, the city had to redraft the law to allow for smoking in restaurants.<sup>2</sup>

A study conducted by independent scientists concluded that it would take a marathon eating session of 16-and-a-half days, or more than 400 continuous hours, for a diner in a typical restaurant to be exposed to the nicotine "equivalent" of one cigarette.<sup>3</sup>

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<sup>1</sup>"Open Door To Hospitality: Accommodating Smokers and Nonsmokers," Tobacco Institute, 1988.

<sup>2</sup>Ibid.

<sup>3</sup>"Environmental Tobacco Smoke Survey," International Technology Corporation, August 4, 1987.

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### SUMMARY ARGUMENTS

1. By Restricting Smoking In Restaurants, Businesses Will Not Only Lose The Business Of Smokers, But That Of Those In The Company Of Smokers.
2. Loss Of Business In The Private Sector Results In Decreased Tax Revenues For Government. If business suffers as a result of increased public smoking regulation, so will government. Lower business revenues, the possibility of business failure, and subsequent declines in employment will reduce the taxable income base and increase unemployment compensation payments.
3. Respect, Tolerance, And Accommodation Must Remain The Business Of People, Not Government.
4. Legislating Behavior That Merely Annoys Some People Was Never Meant To Be The Business Of Government.
5. The Answer To The Public Smoking Issue Lies In Mutual Courtesy On The Part Of Smokers And Nonsmokers.
6. Restaurant Smoking Restriction Proposals Smack Of Elitism. Lower income groups tend to smoke in higher proportions than the more affluent. Therefore, members of this income group have a greater chance of being fined or arrested for violating this measure.
7. Restaurant Owners And Managers Can Best Determine The Smoking Policy That Suits Their Clientele Without The Interference Of Government. Indeed, marketplace economics makes the successful accommodation of all patrons a business imperative regardless of government intrusion.

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WORKPLACE SMOKING RESTRICTIONS: LITIGATION HISTORY (3/90)

1. Most courts have struck down arguments that a tobacco smoke-free environment is guaranteed by provisions of the U.S. Constitution.
2. The Federal Occupational Safety and Health Act has been cited as a basis for restricting smoking in the workplace, in that the Act requires agencies to "provide safe and healthful places and conditions of employment," but the court held the Act does not create a private right of action to individual employee plaintiffs seeking smoke-free workplaces. (Federal Employees for Non-Smokers' Rights vs. U.S., 1978)
3. The argument that common law entitles a nonsmoking employee to a tobacco smoke-free workplace has also been rejected, in a 1983 decision, Gordon vs. Raven Systems & Research Inc. The District of Columbia Court of Appeals decision stated, "[T]he common law does not impose upon an employer the duty or burden to conform his workplace to the particular needs or sensitivities of an individual employee."
4. Also in 1983, in Commonwealth of Pennsylvania vs. Pennsylvania Labor Relations Board, the court ruled that an employer cannot impose smoking restrictions unilaterally when a collective bargaining agreement is in effect.
5. In 1975, Gasper nonsmoking employees sued those who managed the superdome to prohibit smoking during public events (Gasper v. Louisiana Stadium and Exposition District). The court found "the state's permissive attitude ... adequately preserves the delicate balance of individual rights without yielding to the temptation to intervene in purely private affairs."
6. The U.S. Court of Appeals for the Tenth Circuit affirmed the dismissal of a complaint alleging that an employer's refusal to provide a smoke-free workplace violated a plaintiff's First Amendment rights "because the smoke interfered with his ability to think."

Source: Covington and Burling

STATE  
SMOKING RESTRICTION LAWS  
January 1990

The Tobacco Institute  
State Activities Division

State	Any Public Bldg. Prohibited As No Smoking	Elevators	Public Trans- portation	Educational Facilities	Cultural Facilities	Health Care Facilities	Govt. Owned Bldg./Public Meetings	Food Stores	Retail Stores	Restaurants	Workplace- Government	Workplace- Private Sector
ALABAMA												
ALASKA	•	•	•	•	•	•	•	•		•	•	
ARIZONA		•	•	•	•	•	•				•	
ARKANSAS						•	•				•	
CALIFORNIA			•	•	•	•	•	•			•	
COLORADO	•	•	•	•	•	•	•					
CONNECTICUT		•	•	•		•	•	•		•	•	•
DELAWARE			•				•				•	
FLORIDA		•	•	•	•	•	•	•	•	•	•	•
GEORGIA	•	•	•									
HAWAII	•	•	•		•	•	•	•	•	•	•	
IDAHO		•	•	•	•	•	•	•	•	•		
ILLINOIS		•	•	•	•	•	•	•	•	•	•	•
INDIANA							•				•	
IOWA		•	•		•	•	•	•	•		•	•
KANSAS		•	•	•	•	•	•	•	•	•		
KENTUCKY				•								
LOUISIANA					•							
MAINE	•		•	•		•	•		•	•	•	•
MARYLAND		•	•			•		•				
MASSACHUSETTS		•	•		•	•	•	•		•		
MICHIGAN		•	•	•	•	•	•	•		•	•	
MINNESOTA	•	•	•	•	•	•	•	•	•	•	•	•
MISSISSIPPI			•									
MISSOURI												
MONTANA	•	•	•	•	•	•	•	•	•	•	•	•
NEBRASKA	•	•	•	•	•	•	•	•	•	•	•	•
NEVADA		•	•	•	•	•	•	•			•	
NEW HAMPSHIRE	•	•	•	•	•	•	•	•	•	•	•	•
NEW JERSEY	•	•	•	•	•	•	•	•		•	•	•
NEW MEXICO											•	
NEW YORK		•	•	•	•	•	•	•	•	•	•	•
NORTH CAROLINA												
NORTH DAKOTA	•	•	•	•	•	•	•			•		
OHIO		•	•	•	•	•	•					
OKLAHOMA		•	•	•	•	•	•			•	•	
OREGON	•	•		•	•	•		•	•	•	•	
PENNSYLVANIA	•	•	•	•	•	•	•		•	•	•	•
RHODE ISLAND		•	•	•	•	•		•		•	•	•
SOUTH CAROLINA												
SOUTH DAKOTA		•	•	•	•	•	•					
TENNESSEE												
TEXAS		•	•	•	•	•						
UTAH	•	•	•	•	•	•	•	•	•	•	•	•
VERMONT	•			•			•				•	•
VIRGINIA												
WASHINGTON		•	•	•	•	•	•	•	•	•		
WEST VIRGINIA			•			•						
WISCONSIN		•	•	•	•	•	•	•	•	•	•	•
WYOMING												
43 States	15	32	36	30	31	35	34	24	18	24	28	16
D.C.		•	•	•		•	•		•	•		

Fire Prevention  
Laws are not  
included.

\*Local Authorizing  
Statute

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**B** CIGARETTE EXCISE  
TAXES

**2022708108**

## CIGARETTE EXCISE TAXES - EXECUTIVE SUMMARY (4/89)

### SMOKERS ARE ALREADY TAXED ENOUGH

Smokers in this country already pay over \$10 billion each year in federal, state, and local cigarette taxes. That's about \$340 per year in taxes for a family with two smokers. If the federal cigarette tax doubles, a family with two smokers would have to pay over \$500 per year in cigarette taxes.

### STATE AND LOCAL CIGARETTE TAXES HAVE INCREASED SUBSTANTIALLY SINCE 1978

In the last 10 years, 41 states have raised taxes on cigarettes. The average state excise tax rate increased by 42%. Local cigarette tax collections have increased by 54%. Since 1978, 35 new localities have imposed taxes on cigarettes.

### CIGARETTE EXCISE TAXES ARE REGRESSIVE

A smoking household earning \$10,000 per year pays four times the percentage of its income in cigarette taxes over a household earning \$50,000 pays. A U.S. Congressional Budget Office report concluded that an increase in the cigarette excise tax "would be the most regressive of all possible excise tax hikes." The same study also noted that 50% of the households in the country purchase tobacco products. A federal cigarette tax increase would adversely affect the budgets of half of the families in the country.

### INCREASING CIGARETTE TAXES WILL COST JOBS

2.3 million jobs in this country are directly or indirectly related to the tobacco industry.

- If the federal excise tax on cigarettes is doubled, 184,000 jobs in the nation would be at risk. Thus 1 of every 12 people currently working in tobacco-related jobs stands to lose his or her job.
- If individual states increase their cigarette excise tax, a significant number of jobs could be lost in that state. For example, the 25 cent cigarette excise tax imposed on January 1, 1989, in California has placed over 12,000 tobacco-related jobs in jeopardy.

### CIGARETTE TAXES ARE THE DOMAIN OF THE STATES

All 50 states and 425 cities and counties rely on cigarette tax revenues to fund basic services. In 1988, cigarette taxes provided states and localities with \$5.1 billion in much-needed revenue. A 1989 study by the National Conference of State Legislators (NCSL) shows that federal excise taxes cost the states \$3.7 billion in lost revenue from 1983-88. The study further projected, at present federal and state tax rates, excise taxes will cost the states \$3.5 billion more in the next five years by eroding the revenue base due to lost sales. Moreover, a 1987 study by Peat Marwick Main & Co. estimates that doubling the federal excise tax on cigarettes would decrease state and local cigarette tax collections by \$361 million in the first year, reducing funding for education, housing, and other services.

THE TAX BURDEN ON CIGARETTES (4/89)

CIGARETTE EXCISE TAX COLLECTIONS, FY1978-1987

FY	GROSS FEDERAL (\$000)	GROSS STATE (\$000)	GROSS LOCAL (\$000)	GROSS STATE SALES TAX + (\$000)	TOTAL (\$000)
1978	2,374,085	3,728,378	125,706	660,079	6,888,248
1979	2,356,110	3,715,498	127,752	686,461	6,885,821
1980	2,604,364	3,814,437	132,283	735,444	7,286,528
1981	2,488,221	3,960,507	163,925	793,268	7,405,921
1982	2,496,112	4,046,049	177,619	877,579	7,597,358
1983	3,424,357*	4,234,372	174,414	1,005,915	8,929,056
1984	4,749,186	4,340,973	179,683	1,132,036	10,401,877
1985	4,442,487	4,425,836	195,938	1,169,196	10,233,456
1986	4,430,815	4,539,916	198,684	1,230,860	10,400,274
1987	4,752,300	4,659,916	196,250	1,300,000	10,578,917
1988	4,570,000	4,891,806	194,210	1,384,600	11,040,616

Note: All figures for fiscal year ending June 30th.

+ Average nationwide state sales tax figure of 4.2%.

\* For the first 6 months of the fiscal year, the rate was .80/carton.

AVERAGE TAX RATES (\$/carton)

FY	FEDERAL EXCISE	STATE EXCISE	STATE SALES	LOCAL EXCISE	TOTAL TAX
1978	.80	1.29	.20	.30	2.59
1979	.80	1.29	.20	.30	2.59
1980	.80	1.31	.20	.30	2.61
1981	.80	1.32	.20	.30	2.62
1982	.80	1.35	.30	.40	2.85
1983	1.60*	1.47	.30	.40	3.77
1984	1.60	1.53	.40	.40	3.93
1985	1.60	1.59	.40	.50	4.09
1986	1.60	1.62	.40	.50	4.12
1987	1.60	1.69	.40	.50	4.19
1988	1.60	1.83	.40	.50	4.33

STATE AND LOCAL CIGARETTE TAXES HAVE INCREASED SUBSTANTIALLY SINCE 1978

In the last 10 years, 41 states have increased their taxes on cigarettes. The average excise tax has increased 42 percent. Local cigarette tax collections have increased by 54 percent. Since 1978, 35 new localities have imposed taxes on cigarettes.<sup>1</sup>

HIGHER CIGARETTE TAXES LEAD TO BOOTLEGGING AND TAX EVASION

For over a decade, the states' experience with cigarette tax increases has been profoundly affected by concerns about interstate smuggling of cigarettes. Disparities in state tax rates exacerbate smuggling, its related law enforcement problems, and undermine legitimate business:

1. In 1985, the Advisory Commission on Intergovernmental Relations published a report that estimated the amount of revenue lost by the states from cigarette bootlegging in FY1983 was \$255 million. This is 5.4 percent of estimated tax collections.<sup>2</sup>
2. In 1987, New York State's tax commissioner estimated that the state loses \$25 million a year in tax revenues because of cigarette bootlegging.

Not only do states lose money from bootlegging, but so do businesses. High state cigarette taxes create hot black markets for stolen goods and force businesses to fight back with expensive measures, such as locked cigarette cases and extra security workers on trucks and in stores.

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<sup>1</sup> The Tax Burden On Tobacco: The Tobacco Institute, 1988.

<sup>2</sup> "Cigarette Tax Evasion: A Second Look," Advisory Commission on Intergovernmental Relations, 1985.

FACT SHEET: FEDERAL, STATE, AND LOCAL CIGARETTE TAXES 1951-1988

- o Despite remaining at 8 cents per pack, federal cigarette excise tax revenues grew 192 percent, from \$1.3 billion in 1951 to \$2.5 billion in 1982. Today the tax is 16 cents per pack and this tax contributed \$4.6 billion to the federal budget in 1988--an 84 percent increase since 1982.
- o In 1951, 41 states and 239 localities taxed cigarettes; by 1988 all 50 states and over 425 localities taxed cigarettes--195 additional taxing jurisdictions.
- o In 1951, the average state excise tax per pack was 3.4 cents, in 1988, the average state tax had risen almost sevenfold to 23.5 cents.
- o In 1951, 20 states imposed their sales taxes on cigarettes which averaged 2.5 percent; in 1988, 41 states imposed sales taxes which averaged nearly 5%--more than double the average rate of 1951.
- o In 1951, states and localities collected \$503 million in cigarette excise taxes. By 1988, they collected \$5.1 billion in cigarette excise taxes--an increase of 911 percent or over nine times the 1951 revenues.
- o State and local cigarette tax revenues have on average doubled every 6 years since 1951.
- o In 1951, state sales taxes on cigarettes yielded approximately \$53 million in revenue; by 1988 state sales taxes provided \$1.376 billion in revenue--an increase of 2496 percent, almost 25 times the 1951 revenue.
- o In 1951, all governments, federal, state and local, collected \$1.85 billion in cigarette tax revenues; in 1988, all governments collected over \$10 billion--over five and a half times the 1951 revenue.

(4/89)

CIGARETTE TAX INCREASES COMPARED TO PRICE INCREASES (4/89)

	<u>1951</u>	<u>1988</u>	<u>Increase</u>
Producers' Price Index	91.1	322.0	253%
Consumer Price Index	77.8	340.4	356%
Weighted Avg. Cigarette Tax Rate for All Taxing States and Localities	3.4¢	23.3¢	585%
State Cigarette Excise Tax Collections	\$466M	\$4,892M	950%
Local Cigarette Excise Tax Collections	\$37.5M	\$194.2M	418%
Aggregate State and Local Excise Tax Collections from Cigarettes	\$503M	\$5,086M	911%
Sales Tax Collections from Cigarettes	\$53M	\$1,376M	2,496%
Aggregate Federal, State, and Local Tax Collections from Cigarettes (Excise and Sales)	\$1,850M	\$11,032M	496%

Conclusion:

By any of these six measures, cigarette taxes have not only kept pace with inflation, but have exceeded it. Thus, the real tax burden on cigarettes has steadily increased over the last 37 years.

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EXCISE TAXES ARE REGRESSIVE (4/89)

1. Two studies substantiate the claim that excise taxes are regressive, that is they fall most heavily on those least able to pay:

- a. First, a study prepared by the Congressional Budget Office<sup>1</sup> (CBO) in January 1987 for Senator George Mitchell (D-Maine) shows that federal excise taxes impose the greatest economic burdens on those least able to pay. The study concludes that "an increase in the excise tax on tobacco would be the most regressive of all the tax increases considered."

The CBO study also concluded that an increase in the tax on cigarettes would raise taxes as a percentage of income by five times as much for families with incomes below \$10,000 as for families with incomes of \$50,000 or more.

- b. Second, a study by the Policy Economics Group<sup>2</sup> estimated that families with incomes under \$10,000 will lose almost five times the benefits they received from tax reform if the federal excise tax is doubled. While tax reform cut income taxes by \$400 million for families in this group, an excise tax increase of this magnitude would raise their taxes by nearly \$2 billion.

The Policy Economics study also concluded that a family earning \$10,000 will, on average, spend .29 percent of its income in federal cigarette excise taxes, whereas a family earning \$50,000 will on average spend only .07 percent of its income in federal cigarette excise taxes. The proportion of income spent on federal cigarette taxes by the poorer family is over four times greater than that of the wealthier family.

2. Of the \$4.6 billion collected in federal cigarette excise taxes in FY1988, 37.5% of it was paid by families earning less than \$20,000. Families earning \$50,000 or more paid only 13.8% of this amount.

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<sup>1</sup> "The Distributional Effects of an Increase in Selected Federal Excise Taxes," Congressional Budget Office, 1987.

<sup>2</sup> "An Analysis of the Regressivity of Excise Taxes," Policy Economics Group, May, 1987.

3. People earning less than \$10,000 annually accounted for 2.7 percent of TOTAL income in 1986, but paid 12.7 percent of the tobacco tax. Those earning \$100,000 or more annually accounted for 14.9 percent<sub>3</sub> of TOTAL income, but paid only 3.8 percent of the tobacco tax.
4. A 1989 study done for the Coalition Against Regressive Taxation<sup>4</sup> concluded that the federal tax system has become less progressive over the period 1979-1989 as the shares of taxes paid by lower-income and middle-income taxpayers have increased and the share paid by upper income taxpayers has decreased. Therefore, an increase in the cigarette excise tax would make the system even less progressive.

The study also stated, "The earned income credit as structured under current law is poorly designed to offset the effects of specific tax changes, such as increases in excise taxes, among lower-income families. In fact, this distribution would be substantially more uneven than the distribution generated by an excise tax increase without an earned income credit offset."
5. Were excise taxes on cigarettes, gasoline, and alcohol to increase to obtain revenue targets of \$19 billion, the combined tax rate would amount to 2.7% of income for the lowest income group in 1986, versus 0.7% for the top income group.<sup>5</sup>

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<sup>3</sup> The Tobacco Institute, 1988

<sup>4</sup> "Changes in the Progressivity of the Federal Tax System: 1979 to 1989," Prepared for the Coalition Against Regressive Taxation by the Policy Economics Group, April 1989.

<sup>5</sup> "Meeting The Revenue Targets In The 1988 Budget: Will Tax Reform Be Extended Or Undermined?," Citizens For Tax Justice, May 1987.

EXCISE TAX INCREASES HARM THE ECONOMY THROUGH LOST JOBS,  
LOST FARM INCOME, AND REDUCED INCOME TAX REVENUE (4/89)

1. Economists generally agree that excise tax increases are passed on to the consumer in the form of higher prices. This results in lower demand for the products taxed.
2. The federal cigarette excise tax was doubled in January 1983 with the following results:
  - tobacco leaf sales declined by 30 million pounds; GNP was reduced by \$800 million.
  - 14,600 workers in tobacco manufacturing and distribution lost job opportunities; included were the closings of several cigarette production facilities in Louisville, KY (Lorillard, 1985), Petersburg, VA (B&W, 1986), Durham, NC (American, 1987), and Richmond, VA (American, 1987), causing the layoff of 2,500 workers.
  - 10-15,000 farmers have been forced to abandon tobacco farming. In 1983-84, in large part because of the doubling of the excise tax, the tobacco farmer, on average, suffered a decline of one-third in the cash value of his crop.
3. There are approximately 710,000 American jobs directly related to the tobacco industry. It is estimated that over 57,000\* of these jobs would be at risk if the current excise tax increase proposals were enacted. Direct job loss would affect not only the workers and farmers immediately involved, but unemployment effects would ripple throughout the communities where the crops are raised and the products manufactured.
4. Indirect losses in jobs and income would be even greater. Expenditures on goods and services by people directly employed in the tobacco industry create another 1,590,000 jobs in the country. An additional 127,000 jobs stand to be lost in the indirect sectors if the federal cigarette tax doubles.
5. All told, the man-hour equivalent of 184,000 jobs will be jeopardized if the federal excise tax on cigarettes is doubled. Thus 1 of every 12 people currently working in tobacco-related jobs stands to lose his or her job. The jobs of truckers who transport cigarettes, stockroom clerks who store them, and checkout clerks who sell them would be lost in every state.

6. The increase in unemployment and farming income will reduce federal and state income tax collections, offsetting the increase in excise tax collections, and will give rise to additional costs in unemployment insurance and welfare benefits.

Source: "The Economic Impact of the Tobacco Industry on the United States Economy," Chase Econometrics.

\*Note: Uses House Budget Committee's assumption that a \$1.60 per carton tax increase would reduce cigarette sales by 8%.

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FEDERAL EXCISE TAXES INHIBIT THE STATES' ABILITY TO RAISE REVENUE (4/89)

STATUS

"[State] Tax revenues have fallen ... forcing elected officials to consider tax increases and spending cuts to patch their wounded budgets ..." proclaims a New York Times report (3/14/89). States and cities are experiencing the largest shortfalls since the 1975 recession. Twenty-four states cut their budgets in fiscal year 1987. Eleven states cut their budgets in fiscal year 1988, totaling \$903 million. Conservative accounting approaches show the aggregate surplus of the fifty states plunged from more than \$20 billion in 1986 to \$3 billion at the end of 1988. Tax increase proposals are now being considered by many. Struggling the most are the energy-producing and farm states, now trying to cope with declining sales-tax and income-tax revenues. Local governments on the East and West coasts are trying to fill the hole left by the loss of federal revenue sharing, a \$4.6 billion program that expired in 1986.

All 50 states and 425 cities and counties rely on cigarette tax revenues to fund basic services to their citizens. In 1988, cigarettes provided states and localities with \$6.4 billion in much-needed revenue.<sup>1</sup> Increasing the federal cigarette excise tax would decrease state and local tax collections, and would reduce funding for education, housing, and other services.

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<sup>1</sup> The Tax Burden on Tobacco, The Tobacco Institute, 1988.

### SUMMARY ARGUMENTS

1. A 1989 study conducted by the National Conference of State Legislatures (NCSL) shows that federal excise taxes cost the states \$3.7 billion in lost revenue from 1983-88. The study further projected that, at present federal and state tax rates, excise taxes<sup>2</sup> will cost the states \$3.5 billion more in the next five years. Moreover, a 1987 study by Peat Marwick Main & Co. estimates that doubling the federal excise tax on cigarettes would decrease state and local tax collections by \$316 million in the first year, reducing funding for education, housing, and other services.<sup>3</sup>
2. Due to current federal excise tax rates, funds provided to the localities by the states have already declined by \$562 million since 1983, and it is estimated that they will lose \$533.5 million more by 1992. If the federal excise tax is increased, localities would lose an additional \$37.6 million.<sup>1,3,4</sup>
3. Education programs in the states have lost \$82.3 million and, by 1992, these programs will lose an additional \$82.3 million. If the federal excise tax is increased, state education programs would lose an additional \$17.3 million.<sup>1,3,4</sup>

### IMPACT

"State and local governments have traditionally relied on excise taxes for a large part of their revenue mix. Following the elimination of General Revenue Sharing and other federal programs, excise taxes have become an even more important financing mechanism to enable the states to take on the responsibilities abandoned by the federal government. Any effort by Congress to raise federal excise taxes will inevitably diminish the ability of state and local governments to finance the delivery of vital public services." (Senators George Mitchell (D-Maine) and David Durenberger (R-Minnesota) in a "Dear Colleague" letter, May, 1987.)

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<sup>2</sup> "The Impact of Higher Federal Excise Taxes on State Finances," National Conference of State Legislatures, January 1989.

<sup>3</sup> "Effects of Federal Excise Tax Rate Increases on State Excise Tax Revenues," The Policy Economics Group, Peat Marwick Main & Co., 1987.

<sup>4</sup> "Earmarking Excise Taxes," National Conference of State Legislatures, 1987.

TABLE 1

Revenue Losses to LOCALITIES Due to Current Federal Excise Taxes  
(\\$Millions)

State	1983-1988 Cigarettes	1983-1988 Distilled Spirits	Gasoline	Total Loss	1988-1992 Projected Loss
Alabama	--	--	\$24.1	\$24.1	\$22.3
Arkansas	--	--	\$10.1	\$10.1	\$9.9
California	\$15.3	--	\$106.4	\$121.7	\$120.3
Colorado	\$3.2	--	--	\$3.2	\$2.7
Florida	\$33.2	--	\$44.3	\$77.5	\$68.1
Indiana	\$12.5	\$ .3	\$33.0	\$45.8	\$43.9
Kansas	--	\$ .07	\$12.4	\$12.5	\$11.4
Louisiana	\$10.3	--	--	\$10.3	\$8.2
Maryland	\$3.0	\$ .3	\$17.0	\$20.3	\$20.2
Massachusetts	\$11.3	--	\$49.2	\$60.5	\$50.3
Minnesota	--	--	\$26.1	\$26.1	\$23.0
Mississippi	--	--	\$7.6	\$7.6	\$9.1
Missouri	--	--	\$12.6	\$12.6	\$14.2
Montana	--	--	\$2.8	\$2.8	\$2.7
Nevada	\$2.3	\$ .08	\$6.0	\$8.4	\$9.0
New Hampshire	--	--	\$1.6	\$1.6	\$1.4
New Mexico	\$ .8	--	\$2.8	\$3.6	\$3.5
North Dakota	\$ .4	--	\$4.4	\$4.8	\$4.8
Oklahoma	--	\$ .2	\$16.2	\$16.4	\$18.8
Oregon	\$1.2	--	\$7.8	\$9.0	\$8.2
Pennsylvania	--	--	\$4.8	\$4.8	\$4.2
South Carolina	--	\$ .2	\$3.9	\$4.1	\$4.1

TABLE 1 (cont.)

Revenue Losses to LOCALITIES Due to Current Federal Excise Taxes  
(\\$Millions)

State		1983-1988			1988-1992
	Cigarettes	Distilled Spirits	Gasoline	Total Loss	Projected Loss
South Dakota	--	\$ .1	\$1.4	\$1.5	\$1.3
Tennessee	--	\$1.0	\$35.7	\$36.7	\$37.9
Texas	--	\$ .9	\$2.3	\$3.2	\$3.7
Washington	--	\$ .6	\$31.6	\$32.2	\$29.9
Wyoming	\$ .6	--	--	\$ .6	\$ .4
Total	\$94.1	\$3.7	\$464.1	\$562.0	\$533.5

Sources:

The Impact of Higher Federal Excise Taxes on State Finances, National  
Conference of State Legislatures, 1989.

TMA Guide to Tobacco Taxes, Tobacco Merchants Association.

Earmarking State Taxes, National Conference of State Legislatures, 1987.

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TABLE 2

Revenue Losses to EDUCATION PROGRAMS Due to Current Federal Excise Taxes  
(\\$Millions)

State	1983-1988 Cigarettes	1983-1988 Distilled Spirits	Gasoline	Total Loss	1988-1992 Projected Loss
Alabama	\$4.2	--	--	\$4.2	\$3.4
Alaska	\$.8	--	--	\$.8	\$.7
Michigan	\$4.6	--	--	\$4.6	\$3.6
Missouri	\$10.9	--	--	\$10.9	\$8.3
Nebraska	\$.9	--	--	\$.9	\$.8
South Carolina	--	\$.6	--	\$.6	\$.9
Tennessee	\$15.9	\$.1	--	\$16.0	\$11.7
Texas	\$2.7	\$.8	\$56.7	\$60.2	\$64.5
Total	\$40.0	\$1.5	\$56.7	\$98.2	\$93.9

Sources:

The Impact of Higher Federal Excise Taxes on State Finances, National  
Conference of State Legislatures, 1989.  
TMA Guide to Tobacco Taxes, Tobacco Merchants Association.  
Earmarking State Taxes, National Conference of State Legislatures, 1987.

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TABLE 3

STATES IN WHICH LOCALITIES WOULD LOSE REVENUE  
IF FEDERAL EXCISE TAXES INCREASE

State	Amount localities would lose in excise tax revenues from the following products: (\$Millions)			
	<u>Cigarettes</u>	<u>Alcoholic Beverages*</u>	<u>Gasoline</u>	<u>Total</u>
Alabama	---	\$ .2	\$2.9	\$3.1
Arkansas	---	---	\$1.4	\$1.4
California	\$7.0	---	\$13.0	\$20.0
Colorado	\$1.1	---	---	\$1.1
Florida	\$14.2	---	\$5.1	\$19.3
Idaho	---	\$ .1	---	\$ .1
Indiana	\$6.7	\$ .4	\$4.4	\$11.5
Iowa	---	\$ .3	---	\$ .3
Kansas	---	\$ .09	\$1.5	\$1.6
Louisiana	\$4.8	\$ .05	---	\$4.9
Maryland	\$1.4	\$ .4	\$2.4	\$4.2
Massachusetts	---	---	\$6.0	\$6.0
Minnesota	---	---	\$3.3	\$3.3
Mississippi	---	---	\$1.1	\$1.1
Missouri	---	---	\$1.9	\$1.9
Montana	---	\$ .04	\$ .4	\$ .4
Nevada	\$ .9	\$ .1	\$ .8	\$1.8
New Hampshire	---	---	\$ .2	\$ .2
New Mexico	\$ .3	---	\$ .4	\$ .7
North Carolina	---	\$1.4	---	\$1.4
North Dakota	\$ .3	---	\$ .6	\$ .9
Oklahoma	---	\$ .4	\$1.8	\$2.2

Oregon	\$ .6	\$ .3	\$1.1	\$2.0
Pennsylvania	---	---	\$ .6	\$ .6
South Carolina	---	\$ .7	\$ .5	\$1.2
South Dakota	---	\$ .3	\$ .2	\$ .5
Tennessee	---	\$1.3	\$4.8	\$6.1
Texas	---	---	\$ .4	\$ .4
Utah	---	\$ .5	---	\$ .5
Virginia	---	\$ .9	---	\$ .9
Washington	---	\$ .3	\$3.7	\$4.0
Wyoming	\$ .3	---	---	\$ .3
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Total	\$37.6	\$7.2	\$58.6	\$103.3

\* Alcoholic beverages include beer, wine, and distilled spirits.

+ Totals may not add to material figures due to rounding.

Note:

Table reflects the following assumed increases in federal excise tax rates:

Cigarettes - 16 cents per pack  
 Gasoline - 5 cents per gallon  
 Distilled Spirits - \$2.50 per proof gallon  
 Wine - 52 cents per bottle  
 Beer - 49 cents per six pack

Sources:

Effects of Federal Excise Tax Rate Increases on State Excise Tax Revenues,

The Policy Economics Group of Peat Marwick Main & Co., 1987.

TMA Guide to Tobacco Taxes, Tobacco Merchants Association.

Earmarking State Taxes, National Conference of State Legislatures, 1987.

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TABLE 4

STATES IN WHICH EDUCATION PROGRAMS WOULD LOSE REVENUE  
IF FEDERAL EXCISE TAXES INCREASE

STATE	Amount education programs would lose in excise tax revenues from the following products:			
	(\$Millions)			
	<u>Cigarettes</u>	<u>Alcoholic Beverages*</u>	<u>Gasoline</u>	<u>Total</u>
Alabama	\$1.7	\$1.3	---	\$2.0
Alaska	\$.4	---	---	\$.4
Arizona	---	\$1.01	---	\$1.01
Idaho	---	\$1.03	---	\$1.03
Michigan	\$1.9	\$1.4	---	\$2.3
Missouri	\$4.6	---	---	\$4.6
Nebraska	\$.4	---	---	\$.4
South Carolina	---	\$2.0	---	\$2.0
Tennessee	\$7.1	\$1	---	\$7.2
Texas	\$1.1	\$1.2	\$8.8	\$11.1
Utah	---	\$.4	---	\$.4
Total	\$17.3	\$4.4	\$8.8	\$30.6

\* Alcoholic beverages include beer, wine, and distilled spirits.

+ Totals may not add to material figures due to rounding

Note:

Table reflects the following assumed increases in federal excise tax rates:

Cigarettes - 16 cents per pack  
 Gasoline - 5 cents per gallon  
 Distilled Spirits - \$2.50 per proof gallon  
 Wine - 52 cents per bottle  
 Beer - 49 cents per six pack

Sources:

Effects of Federal Excise Tax Rate Increases on State Excise Tax Revenues,

The Policy Economics Group of Peat Marwick Main & Co., 1987.

TMA Guide to Tobacco Taxes, Tobacco Merchants Association.

Earmarking State Taxes, National Conference of State Legislatures, 1987.

THERE IS NO NEED FOR AN INCREASE IN THE FEDERAL CIGARETTE EXCISE TAX  
(4/89)

1. President Bush's budget calls for the federal government to spend \$1.6 trillion in 1990, an increase of \$14 billion over 1989 levels.
2. The Congressional Budget Office predicts a revenue increase of \$87 billion in 1990.
3. Federal tax revenues have climbed from \$517 billion in 1980 to an estimated \$979 billion in 1989, an increase of approximately 89 percent.
4. Over the 1980-89 period, revenues grew by an average of about \$51 billion yearly. In the last six years, tax revenues have grown by an average of more than \$63 billion annually.
5. In October 1988, the Congressional Budget Office examined the entire range of federal taxes, including personal and corporate income taxes, social security taxes, and excise taxes. The CBO found that the vast majority of American families are actually paying a higher share of their incomes in overall federal taxes than they did ten years ago.
6. The total tax burden is at an all-time high, according to the Tax Foundation. The average American works until May 6 to pay all federal, state, and local taxes.
7. The actual growth of tax revenues, like federal spending, has easily outstripped the inflation rate.
8. A complete freeze on federal spending would create a budget surplus in as little as two years.
9. The Congressional Budget Office projects that tax revenues will grow by nearly \$300 billion over the next four years, but only about \$160 billion in revenue growth is needed to eliminate the deficit.
10. Lawrence B. Lindsey, Associate Professor of Economics, Harvard University, and Faculty Research Fellow, National Bureau of Economic Research, believes, "[Federal] excise taxes on cigarettes, stock transfers and gasoline are likely to be far more costly than their proponents suggest." At the very least, these taxes take away from 1986 tax reform and deprive states of needed revenue.

Source: Citizens for a Sound Economy; February 10, 1989

### 1986 TAX REFORM BENEFITS LOST (4/89)

If Congress increases excise taxes to raise \$10 billion or more, all of the tax relief from the Tax Reform Act of 1986 that was given to families with incomes below \$20,000 will be taken back. In fact, an excise tax increase of this magnitude would raise the taxes of low-income families disproportionately, and would more than offset the income tax reduction these taxpayers received from tax reform.

1. A study by the Policy Economic Group estimated that families with incomes under \$10,000 will lose almost five times the benefits they received from tax reform. While tax reform cut income taxes by \$400 million for families in this group, an excise tax increase of the magnitude being suggested by Congress would raise their taxes by nearly \$2 billion.

The wealthiest Americans, however, those who already received substantial tax savings when the top tax rate was reduced from 50 to 28%, will lose only two percent of the tax relief they received from tax reform.<sup>1</sup>

2. Senator George Mitchell (D-Maine) made the following comments in Congress on May 6, 1987:

"A \$10 billion increase in excise taxes this year will wipe out the tax cut of last year for all those, on average, making below \$10,000, and all those whose incomes are between \$50,000 and \$100,000. Those between \$10,000 and \$40,000 will lose most of their tax cut of last year. The only group that will be better off overall will be the 2 percent of American families whose incomes exceed \$100,000."<sup>2</sup>

3. An increase in the Earned Income Credit has been suggested as a possible means of offsetting the large burden on lower-income families from an increase in excise taxes. A 1989 study done for the Coalition Against Regressive Taxation concluded that this logic was incorrect. In fact, it is substantially more uneven than the distribution generated by an excise tax increase without an earned income credit offset. "The earned income credit as structured under current law is poorly designed to offset the effects of specific tax changes, such as increases in excise taxes, among lower-income families."<sup>3</sup>

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<sup>1</sup> "An Analysis of the Regressivity of Excise Taxes," Policy Economics Group, May 1987.

<sup>2</sup> Congressional Record, May 1987

<sup>3</sup> "Changes in the Progressivity of the Federal Tax System: 1979 to 1989," Prepared for the Coalition Against Regressive Taxation by the Policy Economics Group, April 1989.

## AD VALOREM EXCISE TAXATION (4/89)

### STATUS

Ad valorem excise taxes are taxes on particular classes of products; they vary in specific amount according to the price of the product. A 10% ad valorem tax on cigarettes would yield 8 cents on a pack costing 80 cents and 10 cents on a pack costing \$1.00. By contrast, specific excise taxes levy a single tax amount on a given quantity of cigarettes regardless of price. In the above example, if the specific tax were 10 cents per 20 pack, the state would collect 10 cents on each 20 pack regardless of its price.

Hawaii is the only state with an ad valorem excise tax on cigarettes. New Jersey levies an ad valorem surtax in addition to a specific excise tax. Among localities, New Orleans has a 10% excise tax on tobacco products. Forty states impose a sales tax--a general ad valorem tax--on cigarettes at the same rate (average 4.3%) as on other products. It is collected at the point of sale and generally imposed on the cigarettes' base selling price plus all excise taxes.

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### SUMMARY ARGUMENTS

Ad valorem taxes are poor public policy for several reasons:

1. **They Inject Great Uncertainty Into Tax Revenues.** Ad valorem taxes go up and down with the price of the product, and consumers tend to change not the number of cigarettes they buy, but the price class of the cigarettes they buy. It is relatively easy to predict how many cigarettes will be sold, but very difficult to predict sales by price class. State cigarette taxes based on so many cents per cigarette are a predictable and sure source of revenue.
2. **They Are Very Difficult To Administer And Collect.** Prices of cigarettes vary from brand to brand, wholesaler to wholesaler, and retailer to retailer. Therefore, it is almost impossible for the tax agency to know what it should be receiving in revenues.
3. **They Are Susceptible To Price Manipulation.** Wherever the tax is levied, businesses could set an artificially low price to minimize the tax and then raise the price at another point in the distribution chain after the tax has been assessed. States would lose revenue, thereby defeating the purpose of the tax.
4. **They Encourage Poor Quality In Products.** Because cheaper items are taxed less, manufacturers will produce items with lower quality.
5. **They Impose Varying Tax Burdens In An Irrational Manner.** Taxes would be levied at the same rate on a pack of 25 cigarettes as they would on a pack of 20 cigarettes as long as the prices were the same.
6. **They Subsidize Price Cutting On Cigarettes.** Whenever a cigarette distributor reduced his price, the state tax would fall by an amount equal to the ad valorem rate and reduce the price further at taxpayers' expense. If, for example, the ad valorem rate was 10% and the distributor cut his price by \$2.00 per carton, state taxes would fall by 20 cents per carton and overall prices to consumers would fall \$2.20. The taxpayers would be subsidizing the cigarette price at 20 cents per carton.
7. **They Are Inflationary And Increase Government Spending.** Every wholesale price rise is multiplied by the tax into a larger retail price increase. Higher retail prices increase government spending on programs indexed to inflation, thus absorbing any added tax revenues.
8. **They Are "Hidden Taxes."** The tax is incorporated into the price of goods and services, and not distinguished as a "tax." This makes it deceptive. The government can then increase the tax, frequently and substantially, without people being aware of the extent to which they are being burdened.



### IMPACT

The federal government, 49 states, and several hundred localities have all rejected ad valorem taxes on cigarettes. In testimony before the Senate Finance Committee (4/21/86), Assistant Treasury Secretary J. Roger Mentz restated the reason for rejecting ad valorem taxation of cigarettes:

"Changing to an ad valorem basis would require significant changes in administrative practice and raise compliance problems, for example, through the manipulation of intercompany transfer prices."

If the federal government, with all its resources, does not think it could administer an ad valorem tax, a state would be foolhardy to attempt it. Why gamble with a proven, stable source of revenue--the specific excise tax on cigarettes--by substituting an untried form of taxation, the ad valorem excise?

CIGARETTE EXCISE TAXES: INDEXATION (4/89)

STATUS

Proponents of increased taxation on cigarettes sometimes argue that excise taxes have been declining as a percentage of the price of a pack. The remedy allegedly lies in annually adjusting the excise tax rate based on some gross economic measurement, such as the Consumer Price Index (HR 1233, Beilensen) or per capita gross national product (HR 200, Roybal). The real value of the tax, it is argued, will therefore remain steady.

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### SUMMARY ARGUMENTS

1. **Indexation Can Fuel Inflation.** An increase in the general level of prices increases the excise tax rate, which increases prices further, which pushes up the price index still further, and so on. This inflationary spiral works to the detriment of economic objectives like growth, trade surpluses, full employment.
2. **Indexation Leads To Higher Base Taxing Rates.** The government may impose additional tax increases on top of the adjusted rate.
3. **Indexation Can Damage The Wider Economy.** The development of the tobacco industry becomes linked to something external and uncontrollable. Indexation can cause distortions over and above those imposed by the excise tax itself. Government and the industry will be unable to predict revenues satisfactorily, and because of the impact of the industry on employment, revenues, and the balance of trade, indexation will have wide adverse effects on the economy.
4. **What Is A Suitable Index?** The tax level should take account of government objectives, economic and industry objectives, and social welfare considerations. Indexation does not incorporate or help in achieving any of these.

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CIGARETTE EXCISE TAXES: EARMARKING (4/89)

STATUS

Twenty states earmark their cigarette tax revenues. Of these 20, 8 states earmark all or some of their cigarette tax revenues for health programs; 8 states for building or highway maintenance; 5 states for environmental matters; 6 states for education; and 11 states for local aid:

	<u>1980</u>	<u>1981</u>	<u>1982</u>	<u>1983</u>	<u>1984</u>	<u>1985</u>	<u>1986</u>	<u>1987</u>	<u>1988</u>
Bills introduced:	20	15	29	22	35	106	90	79	58
Bills enacted:	3	2	1	3	3	12	3	5	2
Percent:	15%	13.3%	3.4%	13.6%	8.6%	11.3%	4.4%	5.1%	1.7%

Source: The Tobacco Institute

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## SUMMARY ARGUMENTS

A 1987 study by the National Conference of State Legislatures<sup>1</sup> concluded that:

- o earmarking interferes with resource allocation decisions by neglecting other programs that are in need of financing;
- o earmarking may actually decrease spending for social programs;
- o an important effect of earmarking frequently is to increase political support for raising revenue to a higher level than otherwise would be feasible.

1. **Earmarking Can Hamper Effective Budgetary Control.** Effective fiscal management requires legislatures to weigh the relative merits of each state program in terms of the total funds available. Earmarking results in the inflexible, automatic allocation of funds outside of this process.
2. **Earmarking Can Lead To A Misallocation Of Funds,** giving excess revenues to some functions, while others are under-funded. There is no necessary, or even probable, relationship between the revenue yield from a dedicated source, and the most reasonable level of expenditure on the designated activity.
3. **Earmarking Misleads The Public.** Many people are led to believe that earmarking a tax, fee or lottery leads to increased spending on a particular program when the actual effect may be the opposite. It all depends on the funding levels prior to earmarking.
4. **Earmarking Results In Revenue Instability.** Earmarked revenues from a dedicated source, such as cigarettes, will decline if sales or use of the particular service or product decline. Designated revenue recipients, therefore, may be subject to sudden shortfalls in funding.
5. **The Source Of Earmarking Funds Is Discriminatory.** The ostensible logic for earmarking cigarette excise taxes for health programs is that the health cost burden would be imposed directly on the consumers of a product held responsible for those medical costs. However, to earmark services that have little or nothing to do with the taxed product, and that benefit the general public, is

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<sup>1</sup> "Earmarking State Taxes," National Conference of State Legislatures, 1987.

discriminatory. Higher teachers' salaries, road improvement, or the construction of a new public library are areas where everyone should share the burden. (See social costs.)

6. **Smokers Already Pay Enough Taxes.** In 1988, federal, state, and local governments collected more than \$10 billion in cigarette excise taxes. Since 1861, when the first cigarette excise tax was levied, American smokers have paid more than \$200 billion in excise taxes to support government services -- services provided to all.

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<sup>2</sup> Tax Burden On Tobacco, The Tobacco Institute, 1988

## CIGARETTE EXCISE TAXES: SOCIAL ENGINEERING (4/89)

### STATUS

Unlike government officials who are interested in the revenue-raising capacity of the cigarette excise tax, public health professionals consider the principal attraction of the cigarette excise tax to be its smoking-deterrence function. The use of cigarette excise taxes for social engineering is largely unknown in this country. Historically, these taxes have been used to raise revenue.

The arguments for the use of cigarette excise taxes for social engineering are threefold:

1. Cigarette use is affected by price. Proponents of excise taxes believe that higher taxes will, therefore, reduce consumption.
2. Since social engineering works subtly through the price mechanism, the smoker is unaware of the effects. Both the federal and state excise taxes become part of the price paid by the smoker. A higher price forces the smoker to make a monetary decision based upon price information alone--a most effective form of social engineering. Warning labels, by contrast, provide product information and require a smoker to make an informed decision based upon his or her own risk perceptions. Since the decision is based upon individual choice not compulsion, labels are less effective in behavior modification.
3. Third, since smoking entails social costs, cigarette taxes are a type of user fee. According to the Department of Health and Human Services, the 1987 national health bill was \$500.3 billion. Federal, state, and local spending amounted to 44% of the total. Direct health care costs of alleged smoking-related diseases are estimated to account for about 5% of total health costs. If the proceeds from the cigarette tax were earmarked for medical costs, then there would be a convergence of the revenue-raising desires of government and the smoking-deterrent efforts of the health professional. An increased cigarette excise tax would impose the health cost burden directly on consumers of a product held responsible for those medical costs and eventually would control health care costs by reducing cigarette consumption. By this same logic, excise taxes could be levied on many products (meat, eggs, milk, automobiles, games) to help pay the social costs associated with product use.

The clearest example of the use of the cigarette excise tax for social engineering is the "tar" and nicotine tax. Such a tax is proportional and is graded by "tar" and nicotine content. A "tar" and nicotine tax, however, would only affect established smokers and would have a lesser deterrent affect on overall smoking participation.

State "Tar"/Nicotine Tax

	<u>1980</u>	<u>1981</u>	<u>1982</u>	<u>1983</u>	<u>1984</u>	<u>1985</u>	<u>1986</u>	<u>1987</u>	<u>1988</u>
Bills introduced:	3	1	1	1	1	0	0	0	0
Bills approved:	0	0	0	0	0	0	0	0	0
Percent:	0%	0%	0%	0%	0%	0%	0%	0%	0%

Source: The Tobacco Institute

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### SUMMARY ARGUMENTS

Using the cigarette excise tax for behavior modification is social engineering by an elitist group of health professionals and is a misuse of the system in general, and of cigarette taxes in particular:

1. **Cigarette Manufacturers Do Not Support The Sale Or Distribution Of Cigarettes To Minors.** Smoking is an adult custom and is treated as such in all manufacturers' advertising and sampling programs. Forty-five states have already enacted criminal penalties for the sale of cigarettes to minors.
2. **Raising Cigarette Taxes For Behavior Modification Is A "Blame-The-Victim" Policy.** Hiking cigarette taxes to intentionally make smoking financially burdensome is discriminatory, regressive and puritanical social engineering. In its own survey, the American Cancer Society observed that 87.5 percent of smokers find smoking pleasurable.
3. **Cigarette Excise Taxes Are Regressive.** A smoking household earning \$10,000 per year pays four times the percentage of its income in cigarette taxes over the household earning \$50,000. Since the poor spend a larger proportion of their income on cigarettes, a tax increase hits them harder than it hits the more affluent. When cigarette excise taxes are earmarked for public health care, a cruel joke is being played on the poor since they are footing the bill for services purportedly provided to them for free.
4. **Cigarette Tax Revenues Already Far Exceed Even The Most Exaggerated Estimates Of The "Social Cost" Of Smoking.** Anti-smoking groups have taken the medical expenditures on smoking-related illnesses and estimated that the average adult smoker costs society approximately \$100 in additional insurance premiums. If the cigarette excise tax is viewed as an offsetting payment to these social costs, then smokers are grossly overcharged. The average adult smoker pays out close to \$340 in federal, state, and local taxes annually.

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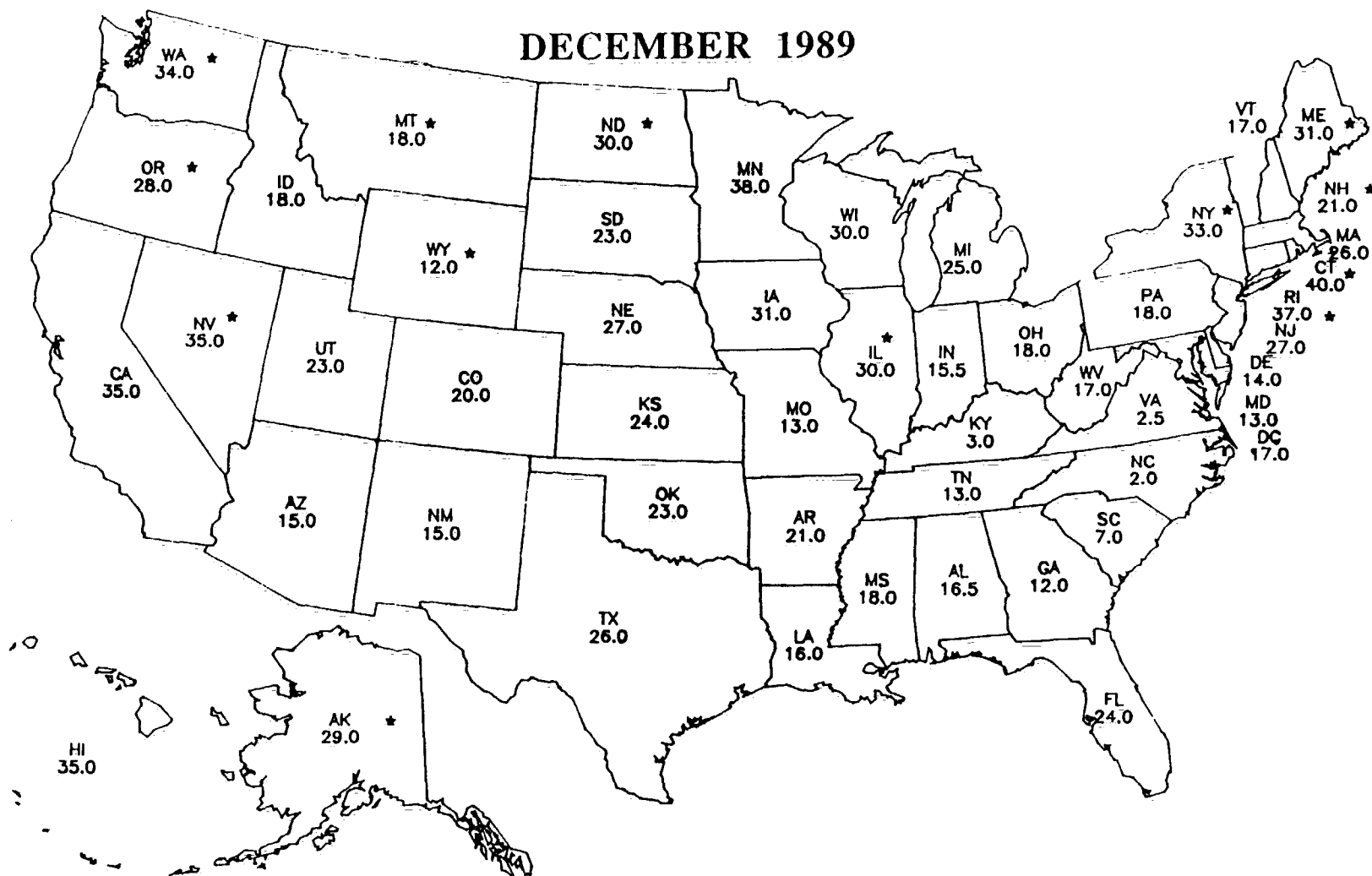
1 "An Analysis of the Regressivity of Excise Taxes," Policy Economics Group, May 1987.

5. **Cigarette Excise Taxes Are The Domain Of The States.** In 1988, cigarette excise taxes provided the states with \$4.9 billion in much needed revenue. State taxes generally exceed the federal tax and are increased more frequently. A federal smoking deterrent tax would reduce consumption and devastate state cigarette tax revenues which support education, housing, and other services.
6. **The Use Of Excise Taxes To Control Behavior Violates A Consumer's Right To Choose.** Higher cigarette excise taxes increase the price of a pack of cigarettes out of the means of lower income consumers. This takes away their right to make a personally informed decision based upon individual choice. The philosophies of a selected group of individuals are, therefore, projected on society.

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# STATE CIGARETTE EXCISE TAX RATES

DECEMBER 1989



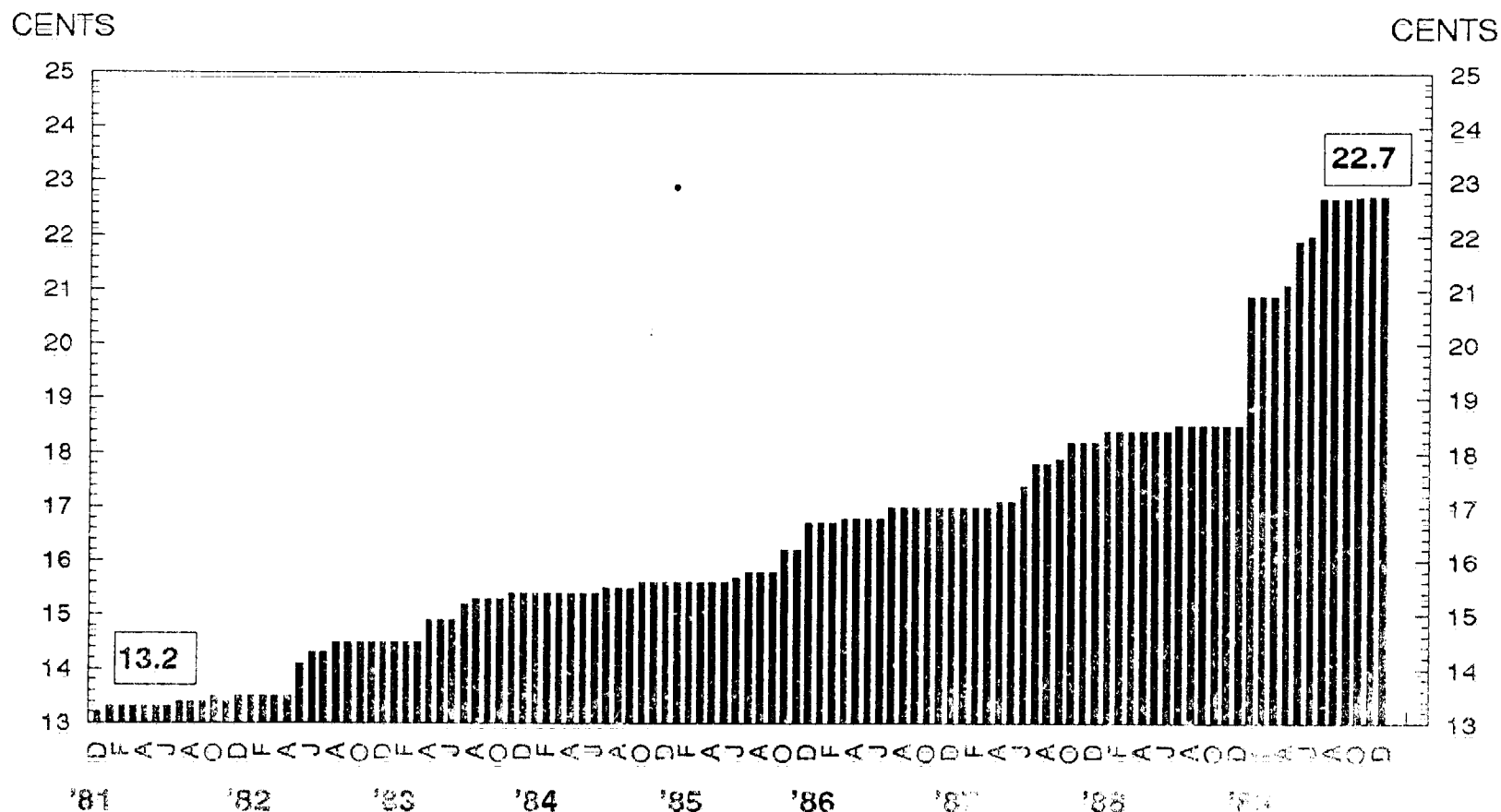
(RATES SHOWN IN CENTS PER PACK)

\*Increase Enacted In 1989

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# CIGARETTE TAX RATE

## NATIONAL WEIGHTED AVERAGE PER PACK



SOURCE: TOBACCO INSTITUTE, MIA

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STATE CIGARETTE EXCISE TAX INCREASES SINCE 1983

<u>State</u>	<u>Tax Increase</u>	<u>Effective</u>
<u>1983</u>		
Arkansas	17.75 to 21 cents	3/83
Colorado	10 to 15 cents	11/83
Connecticut	21 to 26 cents	8/83
Maine	16 to 20 cents	9/83
Massachusetts	21 to 26 cents	7/83
Montana	12 to 16 cents	7/83
Nevada	10 to 15 cents	7/83
New Hampshire	12 to 17 cents	8/83
New Jersey	24 to 25 cents	7/83
New York	15 to 21 cents	4/83
North Dakota	12 to 18 cents	4/83
Vermont	12 to 17 cents	8/83
<u>1984</u>		
Alabama	16 to 16.5 cents	7/84
Arizona	13 to 15 cents	7/84
Louisiana	11 to 16 cents	7/84
Texas	18.5 to 19.5 cents	10/84
<u>1985</u>		
Alaska	8 to 16 cents	10/85
Illinois	12 to 20 cents	12/85
Iowa	18 to 26 cents	10/85
Kansas	16 to 24 cents	10/85
Maine	20 to 28 cents	10/85
Minnesota	18 to 23 cents	7/85
Mississippi	11 to 18 cents	6/85
Oregon	19 to 27 cents	10/85
Rhode Island	23 to 23.4 cents	7/85
South Dakota	15 to 23 cents	7/85
Texas	19.5 to 20.5 cents	9/85
<u>1986</u>		
Colorado	15 to 20 cents	7/86
Florida	21 to 24 cents	7/86
Nebraska	18 to 23 cents	3/86
New Mexico	12 to 15 cents	7/86
Rhode Island	23.4 to 25 cents	7/86
Washington	23 to 31 cents	4/86
<u>1987</u>		
District of Columbia	13 to 17 cents	4/87
Idaho	9.1 to 18 cents	4/87
Indiana	10.5 to 15.5 cents	7/87
Minnesota	23 to 38 cents	6/87
Nebraska	23 to 27 cents	7/87
Nevada	15 to 20 cents	7/87
New Jersey	25 to 27 cents	7/87
North Dakota	18 to 27 cents	7/87
Ohio	14 to 18 cents	7/87
Oklahoma	18 to 23 cents	6/87
Texas	20.5 to 26 cents	7/87
Utah	12 to 23 cents	4/87
Wisconsin	25 to 30 cents	9/87

1988

Iowa	26 to 34 cents	3/88
Michigan	21 to 25 cents	1/88
Rhode Island	25 to 27 cents	7/88
California	10 to 35 cents	1/89

1989

Alaska	16 to 29 cents	9/89
Connecticut	26 to 40 cents	4/89
Illinois	20 to 30 cents	7/89
Maine	28 to 31 cents	10/89
Montana	16 to 18 cents	11/89
Nevada	20 to 35 cents	7/89
New Hampshire	17 to 21 cents	7/89
New York	21 to 33 cents	5/89
North Dakota	27 to 30 cents	7/89
Oregon	27 to 28 cents	11/89
Rhode Island	27 to 37 cents	7/89
Washington	31 to 34 cents	6/89
Wyoming	8 to 12 cents	7/89

<u>STATE</u>	<u>STATE EXCISE TAX AS OF 1/83</u>	<u>CURRENT STATE EXCISE TAX</u>	<u>PERCENT CHANGE IN THE TAX</u>	<u>DATE INCREASES WERE ENACTED</u>
AL	.16	.165	3.1%	7/84
AK	.08	.29	262.5%	10/85, 9/89
AZ	.13	.15	15.3%	7/84
AR	.1775	.21	18.3%	3/83
CA	.10	.35	250.0%	1/89
CO	.10	.20	100.0%	11/83, 7/86
CT	.21	.40	90.5%	8/83, 4/89
DE	.14	.14	0.0%	
DC	.13	.17	30.8%	4/87
FL	.21	.24	14.3%	7/86
GA	.12	.12	0.0%	
HI	.21	.30	38.1%	Annual Ad Valorem
ID	.091	.18	97.8%	4/87
IL	.12	.30	150.0%	12/85, 7/89
IN	.105	.155	47.6%	7/87
IA	.18	.34	88.9%	10/85, 3/88
KS	.11	.24	118.0%	10/85
KY	.03	.03	0.0%	
LA	.11	.16	45.5%	7/84
ME	.16	.31	93.8%	
MD	.13	.13	0.0%	9/83, 10/85, 10/89
MA	.21	.26	23.8%	7/83
MI	.21	.25	19.0%	1/88
MN	.18	.38	111.1%	7/85, 6/87
MS	.11	.18	63.6%	6/85
MO	.13	.13	0.0%	
MT	.12	.18	50.0%	7/83, 11/89
NE	.18	.27	50.0%	3/86, 7/87
NV	.10	.35	250.0%	7/83, 7/87, 7/89
NH	.12	.21	75.0%	8/83, 7/89
NJ	.24	.27	12.5%	7/83, 7/87
NM	.12	.15	25.0%	7/86
NY	.15	.33	120.0%	4/83, 5/89
NC	.02	.02	0.0%	
ND	.12	.30	150.0%	4/83, 7/87, 7/89
OH	.14	.18	28.6%	7/87
OK	.18	.23	27.8%	6/87
OR	.19	.28	47.5%	10/85, 11/89
PA	.18	.18	0.0%	
RI	.23	.37	37.0%	7/85, 7/86, 7/88, 1/89
SC	.07	.07	0.0%	
SD	.15	.23	53.3%	7/85
TN	.13	.13	0.0%	
TX	.185	.26	40.5%	10/84, 9/85, 10/87
UT	.12	.23	91.7%	4/87
VT	.12	.17	41.7%	8/83
VA	.025	.025	0.0%	
WA	.23	.34	47.8%	4/86, 6/89
WV	.17	.17	0.0%	
WI	.25	.30	20.0%	9/87
WY	.08	.12	50.0%	7/89

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**C**

**ADVERTISING**

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### SMOKING AND YOUTH (3/90)

#### 1. Cigarette Marketing Efforts Are Not Targeted At Minors.

It has always been the policy of cigarette manufacturers that smoking or not smoking is a choice to be made by informed adults. Consistent with that belief, the industry has taken the following steps:

- o 1963: announced the termination of brand advertising and promotion in college publications and on campuses.
- o 1964: adopted a code prohibiting advertising and promotion directed at young people, forbidding the use of noted sports figures and other celebrities in advertisements, requiring that models appearing in advertisements must be, and must appear to be, at least 25 years old, and assuring that advertisements do not present smoking as a pastime that leads to success, sexual attractiveness, or prominence.
- o 1969: volunteered to end brand advertisements on television and radio, aware of the concerns of some groups about substantial and unavoidable audiences of young people. Congress prohibited the broadcast of cigarette commercials in 1971.
- o 1981: adopted a new code of sampling practices that prohibits distribution within two blocks of youth activity centers. This code reinforced the industry's own ban on distribution of samples to young people. Samplers are forbidden by contract to violate these restrictions.
- o 1984: issued two guidebooks in conjunction with the National Association of State Boards of Education (NASBE): "Helping Youth Decide" and "Helping Youth Say No." Both provide guidance on family communication to enable parents to help their children develop decision-making skills needed to deal wisely with everyday choices and life-style decisions.
- o 1986: provided NASBE with grants for funding Community Alliance Programs to provide the impetus for broad community-based efforts to improve parent-youth interaction.

#### 2. The Factors Considered Most Important In Youth Initiation Of Smoking Include Peer Influence, Family Attitudes, Home Environment, And Socioeconomic Background.

- o In his latest report on smoking, the Surgeon General concluded:

"There is no scientifically rigorous study available to the public that provides a definitive answer to the basic question of whether advertising and promotion increased the level of tobacco consumption."<sup>1</sup>

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<sup>1</sup>Report of the Surgeon General: Reducing the Health Consequences of Smoking: 25 Years of Progress, Jan. 1989, p. 512.

- o A 1989 study completed by the International Advertising Association concluded:

"[P]arents, siblings and friends, appear to be the determining factors when children start to smoke...."<sup>2</sup>

- o Even Michael Pertschuk, the former Chairman of the Federal Trade Commission who now helps direct the anti-tobacco lobby, stated that "[no] one really pretends that advertising is a major determinant of smoking in this country or any other."<sup>3</sup>
- o Dr. Scott Ward, Professor of Marketing at Wharton School, University of Pennsylvania, before the House Subcommittee on Health and the Environment, testified that "...advertising is among the least influential factor in a young person's developing patterns of consumer behavior."<sup>4</sup>
- o Numerous other studies cite several factors which are more important than advertising and marketing in determining smoking initiation.
  - Why Do Juveniles Start Smoking? (1987) - A five-country study by the International Advertising Association concluded "...advertising plays a minuscule role in the initiation of smoking by the young."<sup>5</sup> Parents, siblings, and friends appear to be the determining factors when children start to smoke.
  - Children and Advertising: Report on a Survey (1987) - This report, prepared for the Advertising Association, is based on a survey of children's awareness of advertising on posters, in the press, and via sponsorship. It states, "There seems to be little support here for a view that initiation into smoking is triggered by advertising, or indirectly through projecting an attractive self image."<sup>6</sup> In this survey, 95 percent of 10 to 14-year-olds who had tried smoking cited peer

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<sup>2</sup>"Juvenile Smoking Initiation & Advertising," Children's Research Unit, London, England, March 1989, p. 3.

<sup>3</sup>"Tobacco Issues", Institute of Politics, Harvard University, April 27, 1983, Tr. 8-9.

<sup>4</sup>Statement of Dr. Scott Ward, Hearing Before the Subcommittee on Health and the Environment of the House Committee on Energy and Commerce, 99th Congress (1986)

<sup>5</sup>"Why Do Juveniles Start Smoking?," International Advertising Association, Inc. 1987, p. 1.

<sup>6</sup>"Children and Advertising: Report on a Survey," RBL Research International, 1987, p. 68.

influence and curiosity as reasons for first trying a cigarette, whereas only 1 percent cited advertising.

- Jean J. Boddewyn, Ph.D., Professor of Marketing and International Business at City University of New York, in a statement made before the legislative committee of the Canadian House of Commons, January 20, 1988, refuted the argument that banning advertising reduces consumption among young Canadians. "[T]he World Health Organization survey found no systematic differences between juvenile smoking habits in countries such as Norway and Finland, where tobacco advertising is completely banned, and in countries such as Austria and England, where it is not. Indeed, the WHO survey and the two CRU studies disclose that the incidence of smoking among young people is higher in many places where advertising is banned than where it is not." He added, "[I]t would be a grave mistake to enact the [advertising] ban when the premise itself is mistaken."<sup>8</sup>
- Factors Associated With The Initiation of "Smoking" In Nine-Year-Old Children (1986). This study examines the influence of several factors on nine-year-old children during the formative stages of initiation into the use of tobacco. The authors limited the examination to the factors they considered most important, including peer influence, family attitudes and habits, home environment, socioeconomic background, and school performance. Advertising was not identified as an important factor.<sup>9</sup>

3. Cigarette Manufacturers Do Not Replace Former Smokers With Teenage Smokers To Maintain Current Levels Of Consumption.

- o Cigarette manufacturers do not replace former smokers with new smokers to maintain current levels of consumption. Measured in terms of per capita consumption, smoking in the U. S. has been declining at an average rate of almost 3 percent for several years. Therefore, the industry is not recruiting any new smokers, just competing among themselves for a larger slice of the shrinking pie.

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<sup>7</sup>Statement of Jean J. Boddewyn, Ph.D., before the Legislative Committee of the House of Commons, Canada, January 20, 1988, p. 19.

<sup>8</sup>Ibid. p. 37.

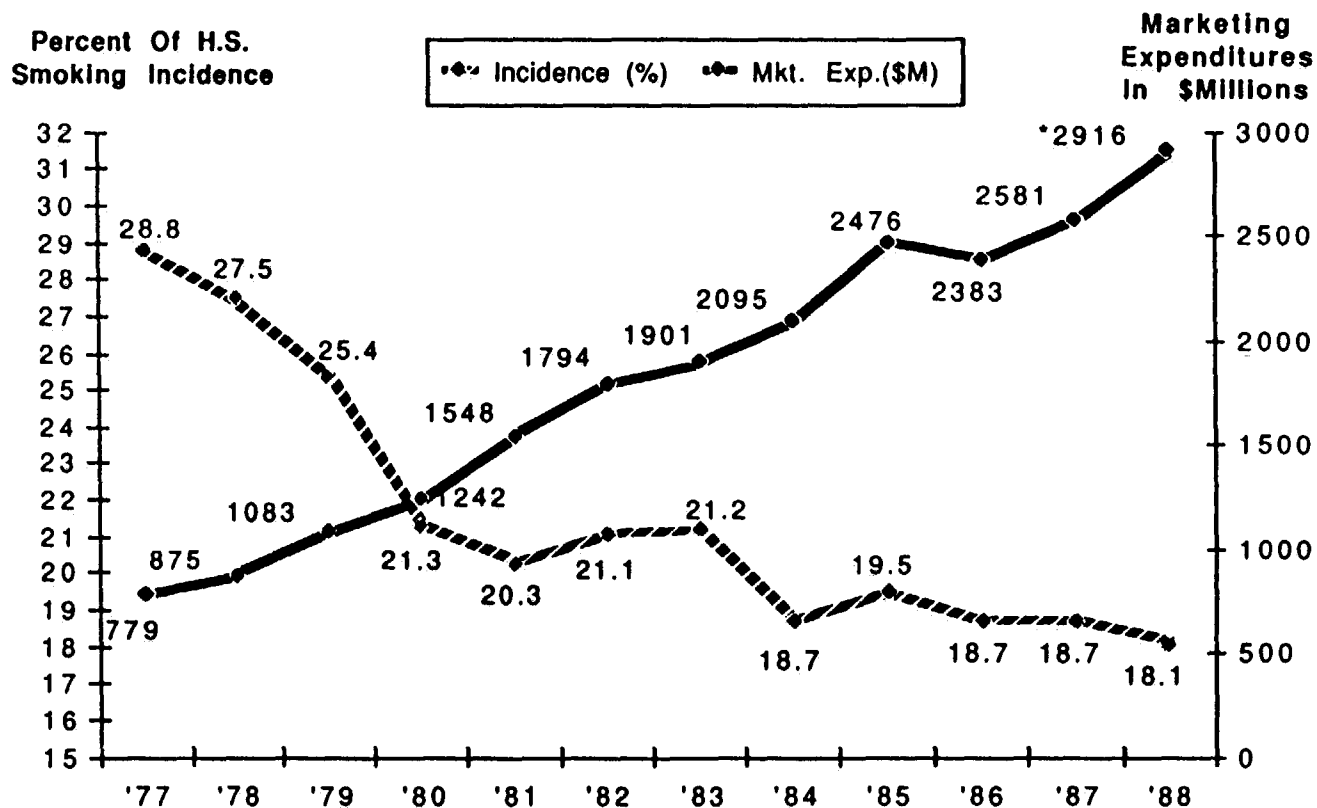
<sup>9</sup>"Factors Associated With The Initiation of 'Smoking' In Nine-Year-Old Children," Advances in Alcohol and Substance Abuse, Spring 1986, vol. 5, pp. 79-89.

- o According to the U.S. Surgeon General's 1989 report, daily smoking among male high school seniors dropped from a peak prevalence of 28 percent in 1976 to 16 percent in 1987 — nearly a 50 percent decrease. Among female high school seniors, daily smoking decreased from 30 percent in 1977 to 20 percent in 1987.<sup>10</sup> Overall smoking incidence among teenage smokers is down almost 50 percent from 1976, while total marketing expenditures for the industry have continually increased. (see chart)

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<sup>10</sup>"Report of the Surgeon General: Reducing the Health Consequences of Smoking: 25 Years of Progress", 1989, p. 302-303.

# HIGH SCHOOL SMOKING INCIDENCE VS. CIGARETTE MARKETING EXPENDITURES



\* 1988 Estimate

Source: The Federal Trade Commission and the University of Michigan 1988 High School Senior Survey.

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## ADVERTISING AND PROMOTION (3/90)

### STATUS

Congress passed legislation banning the broadcast of cigarette advertising in 1971. Since 1984, state and local legislation on advertising and promotion has been preempted by the Federal Comprehensive Smoking Education Act, which amends portions of the Public Health Cigarette Smoking Act of 1969. The amendments reflect the fact that chaos and confusion would result if each state were free to enact its own special legislation on these issues. [In January 1990, Senator Ted Kennedy (D-MA) introduced legislation (S1883 - "The Tobacco Product Education and Health Act") which would remove the state and local pre-emption.]

In 1985, the American Medical Association took the lead in a campaign to restrict ALL cigarette advertising. Federal legislation to achieve this end was first introduced in the 100th Congress, and then again, in the 101st Congress by Rep. Thomas Luken (HR 1250) and Rep. Synar (HR 1493). These proposals are in effect tantamount to a complete ban because they would prohibit the use of scenes, colors, slogans, models, and brand name logos, and would require that the print in tobacco advertising be black ad white.

### SUMMARY ARGUMENTS

#### 1. Cigarettes Are Not The Most Heavily Advertised Product In This Country.

- o Tobacco advertising expenditures as a percent of total advertising spending have been declining for several years, after having risen throughout the 1970's.<sup>1</sup> (see table)
- o In 1988, out of every advertising dollar spent, only 2 cents come from tobacco. For every dollar in revenues a magazine or newspaper receives from advertisers, less than 3 cents comes from tobacco ads.<sup>2</sup>
- o The amount spent on automobile advertisements in magazines in 1988 was more than twice the amount spent on tobacco in magazines and 15 times as much in newspapers.<sup>3</sup>
- o In 1988, Newspapers and magazines receive almost thirty-three times as much revenue from non-tobacco ads as from tobacco ads.<sup>4</sup>
- o Spending on ALL outdoor advertising constituted less than 2% in 1988 of ALL advertising expenditures. Outdoor advertising is 28% of total advertising expenditures on tobacco advertising.<sup>5</sup>
- o In 1988, tobacco advertising expenditures were \$656.3 million, about half of what they were five years earlier. (see table)
- o Moreover, Cigarette Advertisers Are At A Severe Disadvantage When It Comes To Getting A Readers Attention.
  - There are more than 350 cigarette brands and brand packagings on the market.

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<sup>1</sup>Advertising Age, September 27, 1989, p. 8.

<sup>2</sup>Ibid.

<sup>3</sup>Ibid.

<sup>4</sup>Ibid.

<sup>5</sup>Ibid.

<sup>6</sup>Ibid.

ADVERTISING EXPENDITURES AND CIGARETTE USE  
1971-1988

	Tobacco Adv. Expenditures (millions)	Total Adv. Expenditures (millions)*	Tobacco As A % of Total Expenditures	% of High School Seniors Who are Daily Smokers	Per Capita Consumption (≥ 18 yrs. old)
1971	272.5	4,900.0	5.6%	N/A	N/A
1972	285.4	5,270.0	5.4%	N/A	N/A
1973	301.6	7,894.5	3.8%	N/A	4,148
1974	364.4	7,504.0	4.9%	N/A	4,141
1975	397.1	7,268.2	5.5%	26.9%	4,123
1976	511.5	9,200.7	5.6%	28.8%	4,092
1977	592.3	9,593.0	6.2%	28.8%	4,051
1978	656.2	11,848.1	5.5%	27.5%	3,967
1979	808.3	14,684.9	5.5%	25.4%	3,861
1980	880.9	14,254.0	6.2%	21.3%	3,844
1981	1,079.3	17,254.9	6.3%	20.3%	3,836
1982	1,243.9	18,837.6	6.6%	21.1%	3,739
1983	1,533.4	21,184.1	7.2%	21.2%	3,488
1984	872.4	22,504.5	3.9%	18.7%	3,446
1985	887.3	27,363.1	3.2%	19.5%	3,370
1986	728.8	28,824.6	2.5%	18.7%	3,274
1987	599.5	30,193.9	2.0%	18.7%	3,196
1988	656.3	32,208.5	2.0%	18.1%	3,083

Sources:

Advertising Age

University of Michigan National High School Senior Survey

U. S. Department of Agriculture

\*total expenditures of top 100 leading advertisers

- The clutter of advertising is tremendous problem for all industries, especially the tobacco industry. According to Young & Moschis:

"It is generally acknowledged that in a typical magazine environment an 'average' advertisement receives approximately three seconds of viewing time .... Cigarette advertisements receive the least amount of viewing time of any major print advertising category. This is because the typical cigarette advertisement is a quintessential "reminder" advertisement — it grabs your attention, you see the picture and you go on to the next page. It is extremely rare for a cigarette advertisement to hold a viewer's attention for more than a couple of seconds."

2. Advertising Does Not Induce Nonsmokers To Start Smoking.

- o A recent study in Adolescence concluded:

"[P]eer groups are crucially important in the initiation of smoking among young adolescents, particularly females."<sup>8</sup>

- o The President's Council Of Economic Advisers reported in 1987 that studies of why people start smoking identify the influences of parents, siblings and friends as the most important factors. "There is little evidence that advertising results in additional smoking. As with many products, advertising mainly shifts consumers among brands. Evidence from other countries suggests that banning tobacco advertising has not discouraged smoking."<sup>9</sup>
- o Dr. Mortimer B. Lipsett, Director, National Institute of Child Health and Human Development, March 9, 1983, in testimony for the House Subcommittee on Health and the Environment stated "The most forceful determinants of smoking are parents, peers, and older siblings."<sup>10</sup>

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<sup>7</sup>Young & Moschis, "Review of Eye Tracking and Recall Study of Adolescents Viewing Tobacco Advertisements," pp. 9-10 (January 1990).

<sup>8</sup>McDaniel & van Roosmalen, "Peer Group Influence As A Factor In Smoking Behavior of Adolescents," Adolescence, Winter 1989.

<sup>9</sup>"Economic Report of the President: Transmitted to the Congress," January 1987, p. 186.

<sup>10</sup>Statement of M. B. Lipsett, M.D., Hearings on HR 1824 Before the Subcommittee on Health and the Environment of the House Committee on Energy and Commerce, 98th Congress (1983)

- o Commenting on recently proposed restrictions on tobacco advertising, Thomas Schelling, Director of the Institute for the Study of Smoking Behavior and Policy at Harvard University's John F. Kennedy School of Government said he had "seen little scientific evidence that advertising induces people to begin smoking."<sup>11</sup>
  - o In 1986 the World Health Organization published a survey which concluded:
 

"When young people start smoking, the most important predictor is the smoking behaviour and smoking-related attitudes of 'significant others'."<sup>12</sup>
  - o Of the 5.27 trillion cigarettes produced in the world during 1988, approximately 40% were produced and consumed in countries where there is a complete and effective ban on all forms of tobacco advertising.<sup>13</sup> Perhaps half of the 800 million people on earth who smoke have never seen a cigarette advertisement.
3. Advertising Bans Do Not Reduce Cigarette Consumption.
- o In January 1989, Surgeon General C. Everett Koop conceded it may be impossible to prove advertising increases tobacco consumption: "There is no scientifically rigorous study available to the public that provides a definitive answer to the basic question of whether advertising and promotion increase the level of tobacco consumption."<sup>14</sup>
  - o Chinese cigarette production/consumption has more than doubled in the last decade and continues to increase at 12% annually, while ALL commercial advertising is banned in China. Soviet cigarette consumption has increased almost 9 percent in the past decade despite the

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<sup>11</sup>Matlock, Carol, "Smoke-Free Advertising," National Journal, February 24, 1990, p. 453.

<sup>12</sup>Aaro, Wold, Kannas, & Rimpela, "Health Behavior in Schoolchildren: A WHO Cross-National Survey," Health Promotion, vol. 1, no. 1, pp. 21 (May 1986).

<sup>13</sup>U.S. Department of Agriculture, Foreign Agricultural Service.

<sup>14</sup>Report of the Surgeon General: Reducing the Health Consequences of Smoking: 25 Years of Progress, Jan. 1989, p. 512.

TOTAL prohibition of commercial advertising. The same growth is evidenced in other Eastern Bloc countries, including Bulgaria, Yugoslavia and East Germany which also ban advertising. In Thailand, Iceland, Singapore, and Italy, per capita cigarette consumption has continued to grow in spite of the ad bans in effect.<sup>15</sup>

- o Cigarette advertising in Norway was banned in 1975. Per capita consumption rose overall from 1975 through 1980, declined from 1981 through 1983, and rose in 1984. The pattern is very similar to the U.S. consumption pattern except U.S. consumption has been declining since 1983. Smoking incidence in Norway fell from 46 percent in 1975 to 42 percent in 1984. During the same period, U.S. smoking incidence fell from 37 percent to 32 percent. Despite the Norway advertising ban, and the lack of any similar U.S. ban, smoking incidence dropped more rapidly in the U.S. than in Norway over this period.<sup>16</sup>

4. Cigarette Ads Fully Inform The Smoker Of The Purported Health Risks Of Smoking.

- o The warning labels on cigarettes alone appear some 30 billion times each year—that's nearly 500 warnings per smoker per year. Every time anyone sees a cigarette ad, that person also sees the Surgeon General's warning on smoking and health and "tar"/nicotine content.
- o In hearings before the United States House of Representatives in March 1982, a letter by Burns W. Roper, Chairman of the Roper Organization, concluded, "[T]he public is highly aware of the reported dangers of smoking." The letter also stated that more than 90% of adults "believe that smoking is hazardous to a smoker's health."<sup>17</sup>

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<sup>15</sup>J.J. Boddewyn, "Tobacco Advertising Bans and Consumption in 16 Countries," International Advertising Association, 1986.

<sup>16</sup>J.J. Boddewyn, 1986.

<sup>17</sup>Testimony on behalf of the Roper Organization Before the Subcommittee on Health and the Environment of the Committee on Energy and Commerce, March 1982.

- o Young people are especially aware of the "alleged" risks attributed to smoking. As the Surgeon General has stated, "By the time they reach the seventh grade, the vast majority of children believe smoking is dangerous to one's health."<sup>18</sup>
  - o Of 895 children and adolescents questioned in a 1987 survey, over 98 percent said they believed smoking is harmful and "accurately named one or more body parts that are adversely affected by smoking."<sup>19</sup>
5. Advertising Censorship Restricts Competition and Inflicts Economic Damage.
- o The most recent report on the effects of an advertising ban, released by the Leadership Council on Advertising Issues, concluded that:
    - o A ban on tobacco advertising would put 165 magazines out of business, trimming circulation by 5 percent and eliminating 4,130 jobs
    - o A tobacco advertising ban would also cost 7,904 jobs in the newspaper business, or 1.5 percent of the workforce.<sup>20</sup>
6. Cigarette Advertisements Seek To Maintain Brand Share.
- o Advertising in mature markets, such as the one for cigarettes, is not intended to attract new customers, but to maintain brand loyalty and promote brand switching. Annually, ten percent of smokers change brands. Ten percent of the \$35 billion cigarette market is highly significant, since no brand introduced in the last 10 years has gained more than a 5 percent share. A single market-share point in the tobacco industry is worth \$358 million and 10 percent of the market is worth \$3.6 billion.
7. Banning Advertising Of A Legal Product May Be Unconstitutional.
- o In this area of "commercial speech," the Supreme Court has recognized a four-part test to determine if the

<sup>18</sup> Smoking & Health: A Report of Surgeon General: The Health Consequences of Smoking, Behavioral Aspects of Smoking, Education and Prevention", 1979, pp. 17-10.

<sup>19</sup> Leventhal, et al., "Is the Smoking Decision an 'Informed Choice'?", JAMA, vol. 257, 1987, pp. 3373-76.

<sup>20</sup> Penner, R. G. and William Lilley III, "Impact of Advertising on the Competitive Structure of the Media: With a Special Analysis of Advertising of Automobiles, Beer, Wine Tobacco and Liquor," Leadership Council on Advertising Issues, 1990.

restriction of commercial speech is constitutional:

- o ads must concern lawful activity;
- o the government interest must be substantial;
- o the restriction must directly advance interest; and
- o the regulation is no more restrictive than necessary to achieve that interest.<sup>21</sup>

The ability to satisfy at least the last two criteria presents the censors with the biggest constitutional hurdle.

8. A Tobacco Ad Ban Sets A Dangerous Precedent.

- o Legislation enacted to exert behavioral control through the control of free speech is the most dangerous kind of government intrusion. It is beyond the purview of government to decide what is "information" and what is not. Giving the government control over deciding what information is commercially valuable risks reducing all available information in the society (and marketplace) to the lowest common denominator.

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<sup>21</sup>Central Hudson Gas & Electric Corporation v. PSC, 447 U.S. 557 (1980).



#### ADVERTISING AND PRODUCT INNOVATIONS (3/90)

Advertising and marketing techniques such as sampling, couponing, and promotional sponsorship are indispensable tools to convey product information to the consumer. Without the use of these tools, product innovation designed to address consumer demands become severely inhibited. Throughout the last three decades, tobacco companies have undertaken efforts to modify their products in response to consumer demand:

1. Developed filters which reduce the amount of "tar" inhaled by a smoker. In 1955, an average cigarette delivered 37 milligrams of "tar" compared to 12 milligrams of "tar" today. Indeed, there are ultra-low "tar" brands that deliver as little as one or two milligrams of "tar" per cigarette, a 95 percent reduction from the 1955 level.
2. Designed methods for diluting cigarette smoke with fresh air in order to reduce "tar" delivery still further in response to consumer demand. First used in the late 1950s, this process has developed from mere pinpricks in filter material to the present technology in which lasers make microscopic holes throughout the entire cigarette paper to allow for even more complete dilution.
3. In 1989, Superslims from Virginia Slims, a cigarette with 70 percent less smoke from the lit end than the average cigarette, was introduced to the market.

These innovations, created directly because of consumer-demand, would not have been available to consumers if manufacturers were not able to convey information about product characteristics to their customers through advertising and marketing promotions. This holds true for the future as well.

In fact, John E. Calfee, former assistant to the director of the Bureau of Economics at the FTC, concluded, "[T]he fact remains that successive restrictions on advertising have tended to undermine improvements in cigarettes while doing nothing to reduce smoking."<sup>1</sup>

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<sup>1</sup>Calfee, John E., "The Ghost of Advertising Past," Regulation, November/December 1986, p. 45.

## CIGARETTE VENDING MACHINES (3/90)

### STATUS

In December 1985, the American Medical Association introduced a model bill which called for banning the sale of cigarettes from vending machines. In 1987, the U. S. Conference of Mayors adopted a policy to discourage the sale of tobacco by vending machines. In 1988, the National Association of Counties strengthened regulation and enforcement of activities which make tobacco use accessible to minors such as the placement of vending machines.

To date, nine states and 24 localities restrict the sale of cigarettes by vending machine in government buildings or limit their placement to locations not accessible to minors. On October 10, 1989, White Bear Lake, Minnesota became the first local jurisdiction to ban all cigarette vending machine sales.

Number of State/Local Vending Machine Restrictions  
Introduced/Approved - 1986-89

STATE	1986	1987	1988	1989	1990*
intro.	3	18	15	21	23
appr.	-	1	2	2	2
LOCAL					
intro.	5	3	10	27	64
appr.	1	1	3	19	28

\*as of 3/1/90

### SUMMARY ARGUMENTS

1. **Vending Machines Are Not A Significant Source Of Cigarettes For Minors.**  
A 1989 study conducted by Response Research, concluded:

- 84 percent "of the teens who primarily got their cigarettes by purchasing them when they first started smoking bought them over-the-counter."
- "Almost two-thirds of the Frequent Purchasers (64%) buy over-the-counter often,<sup>1</sup> whereas only one in ten (9%) buys from a vending machine often."

State laws in almost all states prohibit the sale of cigarettes to minors. Enforcement of such laws should be sufficient to address any problems or concerns.

2. **The Majority Of Vending Machines Are Not In Areas Youth Can Access.**  
Most cigarette vending machines are in bars, factories and offices. Additional restrictions are not necessary. A 1986 study commissioned by National Automatic Merchandising Association concluded "8 out of 10 cigarette vending machines are located in places where under-age minors are not allowed or usually not present."<sup>2</sup> A 1988 machine placement survey conducted by the Michigan Distributors and Vendors Association confirmed "95.6% (of cigarette machines) are located in places where minors are not allowed or are well supervised."<sup>3</sup>
3. **Since 1962, The Vending Machine Industry Has Followed A 6-Step Code Of Regulation Designed To Insure That Cigarette Vending Machines Are Not A Source Of Cigarettes For Minors.** The Code includes the following provisions:
  - Determine location of machines to which minors are likely to have access;
  - Post "Minors are Forbidden" warning decals;
  - Post on each machine the name, address and phone number of the operator;
  - Solicit the location owner's cooperation to prevent minors from purchasing cigarettes; Relocate machines where necessary;
  - Remove machines from locations where the sale of cigarettes to minors cannot be prevented;
  - Cooperate with competitors to achieve area-wide compliance.<sup>4</sup>

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<sup>1</sup>"Teenage Cigarette Smoking and Purchasing Behavior," Response Research, June/July 1989.

<sup>2</sup>Nationwide Cigarette Vending Machine Placement Study Commissioned by the National Automatic Merchandising Association, 1986.

<sup>3</sup>Michigan Distributors and Vendors Association Survey, 1988.

<sup>4</sup>National Automatic Merchandising Association

4. **Cigarette Vending Machines Are Responsible For Only A Small Percentage Of Total Cigarette Sales.** In 1988, there were 373,800 cigarette vending machines, which represented only 3.5 percent of total cigarette sales. Cigarette vending machine placement has been dramatically reduced in recent years. In 1976, 32,065 new cigarette vending machines were shipped; in 1987 it was less than 4,000.<sup>5</sup>
5. **Prohibiting The Sale Of Cigarettes Through Vending Machines Will Result In Severe Economic Loss.** Beyond the capital loss represented by the devaluation of over 373,800 cigarette vending machines, which is estimated to be approximately \$2 million, 10,000 vending-related jobs will be lost, at an average annual compensation of \$25,000, or \$250 million in total. Moreover, \$1.6 billion will be lost in retail sales.<sup>6</sup>
6. **The Factors Considered Most Important In Youth Initiation Of Smoking Include Peer Influence, Family Attitudes, Home Environment And Socioeconomic Background.** A 1989 study completed by the International Advertising Association concluded:

"[P]arents, siblings and friends, appear to be the determining factors when children start to smoke."

Moreover, a study conducted by Response Research, commissioned by the National Automatic Merchandising Association (1989), found that for 58% of the teens surveyed, "[T]he primary motivator was knowing someone else who smoked." Only 15% of teenage smokers come from families where no one smokes.
7. In sum, a small fraction of the nation's cigarettes are sold through vending machines, a small fraction of the nation's teenagers obtain cigarettes through vending machines and a small fraction of the nation's smokers are teenagers. Banning the sale of cigarettes through vending machines is a "solution" way out of proportion to the "problem".

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<sup>5</sup> Statement of Richard W. Funk, Esq., Chief Counsel, National Automatic Merchandising Association, to the Subcommittee on Transportation and Hazardous Materials of the House Committee on Energy and Commerce, July 25, 1989, p. 4.

<sup>6</sup> Ibid, p. 5.

<sup>7</sup> "Juvenile Smoking Initiation & Advertising," Children's Research Unit, London, England, March 1989, p. 3.

<sup>8</sup> Response Research, June/July 1989.

## STATE/LOCAL VENDING MACHINE RESTRICTIONS (3/90)

<u>State/Locality</u>	<u>Restriction</u>	<u>Year</u>
<u>ALASKA</u>	Vending machines must be inaccessible to minors	1988
<u>CALIFORNIA</u>		
Duarte	Requires cigarette vending machines to be inaccessible to minors	1989
Manteca	Bans cigarette vending machines except on business premises where minors are forbidden	1976
Orange County	Bans cigarette vending machines on county-owned property	1987
<u>CONNECTICUT</u>		
W. Hartford	Bans cigarette vending machines on city-owned property	1986
<u>DELAWARE</u>	Bans sale of tobacco products on gov't property	1989
<u>FLORIDA</u>		
Lake City	Restricts location of vending machines to within the unobstructed view of an adult eye	1988
<u>IDAHO</u>	Vending machines must be inaccessible to minors	1943
<u>ILLINOIS</u>		
Addison	Requires cigarette vending machines accessible to minors to be equipped with a manual, electric or electronic device.	1989
Wheaton	Requires cigarette vending machines accessible to minors to be equipped with a manual, electric or electronic device.	1989
Woodridge	Requires cigarette vending machines accessible to minors to be equipped with a manual, electric or electronic device.	1989
<u>INDIANA</u>	Allow machines in workplaces, bars or must be equipped with a locking device	1990
<u>IOWA</u>	Bans sale of tobacco products in state buildings	1987

<u>State/Locality</u>	<u>Restriction</u>	<u>Year</u>
<u>MAINE</u>	Requires machines to be directly supervised by an adult or inaccessible to minors	1989
<u>MASSACHUSETTS</u>		
Leominster	Restricts vending machines to workplaces, bars	1989
<u>MARYLAND</u>		
Friendship Heights	Requires cigarette vending machines to be located within view of proprietor	1985
Harford County	Bans cigarette vending machines in county-owned facilities	1988
<u>MINNESOTA</u>		
	Allow machines only in workplaces, bars or with locking devices	1990
Austin	restricts vending machines in workplace, bars and public places much use token system	1990
Big Lake	Restricts vending machines to liquor establishments	1990
Blaine	Requires cigarette vending machines to be inaccessible to minors	1989
Bloomington	Bans sale of cigarettes by vending machine	1990
Brooklyn Center	Bans sale of cigarettes by vending machine	1990
Brooklyn Park	Bans sale of cigarettes by vending machine	1990
Cannon Falls	Vending machines must be inaccessible to minors	1990
Coon Rapids	Bans sale of cigarettes by vending machine	1990
Chanhassen	Bans sale of cigarettes by vending machine	1989
Dassel	Bans sale of cigarettes by vending machine	1990
Duluth	Bans vending machines in all public areas except bars and off-sale liquor stores; Complete ban by 1993	1990
Excelsior	Requires supervision of vending machines	1990
Hutchinson	Requires cigarette vending machines to be inaccessible to minors	1990
Jackson	Bans sale of cigarettes by vending machine	1990
Kenyon	Bans sale of cigarettes by vending machine	1990
Milaca	Bans sale of cigarettes by vending machine	1990
Minneapolis	Requires cigarette vending machines to be inaccessible to minors	1989
Monticello	Restricts vending machines-liquor establishments	1990
Mora	Bans sale of cigarettes by vending machine	1990
Morgan	Bans sale of cigarettes by vending machine	1990
New Brighton	Requires that cigarette vending machines be located in areas with restricted access to minors, and be maintained in continuous observation and supervision	1989
Northfield	Bans sale of cigarettes by vending machine	1990
Preston	Restricts vending machines to bars, private clubs and other places where minors are not permitted	1989
Owatonna	Bans sale of cigarettes by vending machine	1990
Redwood Falls	Bans sale of cigarettes by vending machine	1990

<u>State/Locality</u>	<u>Restriction</u>	<u>Year</u>
<u>MINNESOTA (Cont.)</u>		
Richfield	Bans sale of cigarettes by vending machine	1990
Shoreview	Requires cigarette vending machines to be inaccessible to minors	1989
St. Cloud City	Requires cigarette vending machines to be inaccessible to minors	1990
St. Louis Park	Bans sale of cigarettes by vending machine	1990
St. Paul	Requires cigarette vending machines to be inaccessible to minors (machines in public places require locking devices)	1990
West St. Paul	Restricts vending machines to liquor establishments	1990
White Bear Lake	Bans all cigarette vending machines	1989
<u>NEW YORK</u>		
Erie County	Restricts vending machine sales	1990
New York City	Bans the sale of tobacco products in city-owned buildings effective 1/1/91	1989
<u>OREGON</u>		
Lebanon	Resticts vending machines to workplaces, places and places inaccessible to minors	1990
Linn County	Restricts vending machines to area within direct view and 25 feet of the proprietor	1989
<u>TEXAS</u>		
Houston	Bans vending machines in city-owned buildings	1990
<u>UTAH</u>		
	Restricts vending machines to bars, private clubs or workplaces not available to the public	1989
<u>WASHINGTON</u>		
Battleground	Restricts vending machines to commercial buildings, factories and places inaccessible to minors	1989
Clark County	Restricts vending machines to commercial buildings, factories and places inaccessible to minors	1989
King County	Requires cigarette vending machines to be inaccessible to minors; allows machines where proprietor of premises can control use by an electronic device.	1988
MountLake Terrace	Restricts vending machines to workplaces, bars or behind counter	1989
Vancouver	Restricts vending machines to commercial buildings, factories and places inaccessible to minors	1989
<u>WISCONSIN</u>		
	Bans tobacco vending machines within 500 ft. of primary/secondary schools	1988

Source: Tobacco Institute

## SAMPLING BANS (3/90)

### SUMMARY ARGUMENTS

1. A Ban On The Distribution Of A Legal Product To Adult Consumers May Violate The Constitutional Guarantee Of Free Commercial Speech. Moreover, state and local legislation may be totally pre-empted by the Federal Cigarette Labeling and Advertising Act. As the Federal Trade Commission has stated, the federal statute would have to be amended to provide the states with the authority to regulate marketing practices such as sampling.
2. Manufacturers Use Sampling To Switch Smokers From One Brand To Another, Not To Entice Nonsmokers To Begin To Smoke. Annually, ten percent of smokers switch brands. Ten percent of the \$35 billion cigarette market is highly significant since no brand in the last 10 years has gained more than a 5 percent share. A single market-share point in the tobacco industry is worth \$358 million and 10 percent of the market is worth \$3.6 billion.
3. The Tobacco Industry Follows Strict Guidelines To Prevent Irresponsible Sampling. The tobacco industry's own sampling code strictly forbids:
  - o Distribution to persons under the age of 21
  - o Sampling within 2 blocks of educational establishments
  - o Sampling through the mail
  - o Distribution of unsolicited samples to adults who decline or refuse to accept them

It also contains the following provisions:

  - o Samplers must ask whether an individual is a smoker.
  - o Samples must be secured to prevent improper distribution
  - o Samplers may not block pedestrian traffic<sup>1</sup>
  - o Samplers must dispose of litter properly.
5. No One Has Ever Produced Any Credible Evidence That A Minor Or Nonsmoker Was Induced To Start Smoking Because Of A Sample Pack Of Cigarettes--However It Was Obtained.
6. Sampling Bans Hurt The Respective State or Local Community. Localities that ban sampling eliminate jobs for those whose business it is to distribute samples. Tax revenues derived from sample cigarettes are also reduced by

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<sup>1</sup>"Code of Cigarette Sampling Practices," Tobacco Institute, 1985.



sampling bans: although samples are given free to smokers, the manufacturers pay all applicable federal, state, and local taxes on the samples.

7. **Sampling Bans Reduce Consumer Choice And Inhibit The Introduction Of New Products.** They are thus anti-competitive.
8. **Marketing Restrictions Do Not Reduce Consumption.** In countries where sampling and other cigarette marketing efforts are prohibited, cigarette consumption has not declined nor has smoking incidence among minors. What has happened is a slowing of the trend toward lower "tar" and nicotine cigarettes.

January 1990

TOBACCO SAMPLING BANS & RESTRICTIONS

<u>State/Locality</u>	<u>Restriction</u>
<u>Alabama</u>	No state or local laws.
<u>Alaska</u>	No state or local laws.
<u>Arizona</u>	No state or local laws.
<u>Arkansas</u>	No state or local laws.
<u>California</u>	<p>Prohibits sale, gift or other furnishing of tobacco products to persons under age 18. Prohibits local governments from adopting ordinances inconsistent with state law. [1988, Chapter 1045. Section 308 of Penal Code.]</p> <p>Regulates sampling of smokeless tobacco products by direct distribution or through mail-in or telephone requests. Prohibits sampling of smokeless tobacco products within two-block radius of youth-oriented premises. Prohibits distribution of unsolicited smokeless tobacco products through the mail. [1986, Chapter 185. Section 17537.3 of Business &amp; Professions Code.]</p> <p>Repealed by 1988 Law: Prohibits unsolicited distributionn of tobacco products to residences. [1971, Chapter 1005. Section 308b of Penal Code.]</p>

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California, cont'd.

. San Francisco

Prohibits distribution of cigarettes or other tobacco products or "coupons, certificates, or other written material which may be redeemed for tobacco products without charge, to any person on any public street or sidewalk or in any public park or playground or on any other public ground or in any public building."  
[1988. Part II, Chapter VIII, Section 95 of San Francisco Municipal Code (Police Code).]

Colorado

No state or local laws.

Connecticut

No state or local laws.

Delaware

No state or local laws.

Florida

No state law.

. Lake City

Prohibits distribution of cigarettes or other tobacco products "for no consideration or nominal consideration at any public place...that is within two blocks of any playground or school or any public event or function attended primarily by minors."  
[1988, Ordinance 88-628.]

. Tallahassee

Regulates distribution of free cigarettes or other tobacco products. Requires permit from City Manager; prohibits sampling to persons under age 21 or within two blocks of centers of youth activity, and sets other requirements based on Cigarette Industry Code of Sampling Practices. Provides for hearing on complaint of violations; violation is subject to cancellation of permit and suspension for three years.  
[1984, Ordinance 84-0-2370AA.]

Georgia

No state law.

. Atlanta

Prohibits distribution of cigarettes or other tobacco products "free to any person on any public street or sidewalk, or in any public park or playground, or in areas open to the public in any publicly owned or operated building." [1986]

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Hawaii

No state or local laws.

Idaho

Packages of cigarettes for sale or for sampling may include no fewer than 20 cigarettes. [1974, Chapter 211. Chapter 25, Section 63-2502(e).]

Illinois

No state law.

. Addison

Prohibits free distribution of tobacco products on any sidewalk or other property owned by the village, school district, park district or public library. Tobacco dealer's license required for sale or other distribution of tobacco products. [1989, Ordinance 0-89-101. Chapter 13, Sections 13-36 through 13-40, Municipal Code.]

. Wheaton

Prohibits free distribution of tobacco products on any sidewalk or other property owned by the village, school district, park district or public library. Also prohibits sale or other distribution within 100 feet of any school, child care facility or other buildings used for education or recreation programs for persons under age 18. Tobacco dealer's license required for sale or other distribution of tobacco products. [1989. Article VI, Chapter 15, City Code.]

. Woodridge

Prohibits free distribution of tobacco products on any sidewalk or other property owned by the village, school district, park district or public library. Also prohibits sale or other distribution within 100 feet of any school, child care facility or other buildings used for education or recreation programs for persons under age 18. Tobacco dealer's license required for sale or other distribution of tobacco products. [1989, Ordinance 89-15. Chapter 18A, Comprehensive Regulation of Tobacco Products.]

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Indiana

Prohibits distribution of tobacco products to persons under age 18 and defines "distribute" as giving "tobacco to another person as a means of promoting, advertising, or marketing the tobacco to the general public." [1988, Senate Bill 235. Indiana Code 35-46-1-10.]

Iowa

Free sample packages may contain no more than four cigarettes or little cigars and must bear word "Sample." Requires authorization by Director of Taxation for distribution. [1939. Section 98.39.]

Kansas

No state or local laws.

Kentucky

No state or local laws.

Louisiana

Prohibits distribution of promotional samples of tobacco products to persons under age 18. [1988, House Bill 1966. R.S. 14:91.6.]

Maine

Prohibits distribution of free cigarettes or tobacco products to "any person under the age of 18 years in any place, including, but not limited to, a public way or sidewalk, public park or playground, public school or other public buildings, or an entranceway, lobby, hall or other common area of a private building, shopping center or mall." [First passed in 1983, Chapter 239, revised 1989, Chapter 445. 22 MRSA, Section 1579.]

Maryland

No state laws.

. Bowie

Prohibits sampling of tobacco products. [1986.]

Massachusetts

No state law.

. Amherst

Prohibits distribution "except at full retail price" of tobacco products for commercial purposes "in or upon any part of the streets, parks, public grounds, public buildings, or other public places." [1987, Town Meeting Article 52.]

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Massachusetts, cont'd.

- . Boston  
Prohibits distribution "except at full retail price" of tobacco products for commercial purposes "in or upon any part of the streets, parks, public grounds, public buildings, or other public places." [1984. Title 14, Section 270A, City of Boston Code.]
- . Cambridge  
Prohibits distribution of tobacco products in the course of business "free to any person on any public street or sidewalk, or in any public park or playground, or in any other public grounds, or in any public building." [1982. Section 17-41A, Code of the City of Cambridge.]
- . Leominster  
Prohibits distribution of coupons or vouchers redeemable for tobacco products for free or at nominal cost. Prohibits distribution of free or nominal cost sample tobacco products. [1989. Leominster Board of Health Regulations.]
- . Newton  
Prohibits distribution of tobacco products in the course of business "free to any person on any public street or sidewalk, or in any public park or playground, or in any other public grounds, or in any public building." [1982, Ordinance R-224. Section 20-18, Revised Ordinances of the City of Newton.]
- . Somerville  
Prohibits distribution of tobacco products in the course of business "free to any person on any public street or sidewalk, or in any public park or playground, or in any other public grounds, or in any public building." [1983, Ordinance 83-8. Section 12-83, Code of Ordinances of the City of Somerville.]
- . Worcester  
Prohibits distribution of cigarettes or other tobacco products for commercial purposes "free to any person or persons in any public park or playground, at any center of youth activities, schools college campuses or fraternity or sorority houses, or within 200 feet of such enumerated premises or to anyone...under the age of 18 years." [1984. Chapter 15, Section 13, Revised Ordinances of 1974.]

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Michigan

No state or local laws.

Minnesota

Prohibits promotional distribution of tobacco products "except that single serving samples of tobacco may be distributed in tobacco stores." [1987, Chapter 399. Section 325F.77, Subdivision 3, Minnesota Statutes 1986.]

Repealed in 1987: Prohibits promotional distribution of smokeless tobacco products. Requires verification of age before distributing a promotional cigarette sample. [1986, Chapter 352. Section 325F.746.]

. Albert Lea

Prohibits distribution of free cigarettes at anyplace in the city for the purpose of advertising cigarettes or any other product, service or establishment. [1980, Ordinance 2430. Chapter 1721, Section 6, Municipal Code.]

. Minneapolis

Prohibits distribution of free cigarettes "to any person on the public malls, sidewalks or pedestrian concourses" by person in the business of selling or promoting cigarettes. [1979. Title 13, Chapter 281, Section 70, Minneapolis Code of Ordinances relating to License and Business Regulations.]

. St. Paul

Prohibits distribution of free cigarettes "to any person on the sidewalks, pedestrian concourses, pedestrian malls, or pedestrian skyway systems" by person in the business of selling or promoting cigarettes. [1979, Ordinance No. 16609. Chapter 336, Section 8, Saint Paul Legislative Code.]

Mississippi

No state or local laws.

Missouri

No state or local laws.

Montana

No state or local laws.

Nebraska

Prohibits distribution of smokeless tobacco products to the general public "at no cost or at nominal cost or to give coupons and rebate offers with the products" for promotional purposes. [1989, Legislative Bill 48. New Section.]

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<u>Nevada</u>	No state or local laws.
<u>New Hampshire</u>	Prohibits distribution of promotional samples of any tobacco product to persons under age 18. [1986, Chapter 162. RSA 78, Section 12-b.]
<u>New Jersey</u>	No state or local laws.
<u>New Mexico</u>	No state or local laws.
<u>New York</u>	No state or local laws.
<u>North Carolina</u>	No state or local laws.
<u>North Dakota</u>	No state or local laws.
<u>Ohio</u>	Prohibits sale or distribution of tobacco products to persons under age 18. Prohibits distribution in any place that does not have posted a conspicuous sign stating ban on sale to persons under age 18. [1984, House Bill 152. Section 2927.02, Revised Code.]
<u>. Cincinnati</u>	Prohibits handing out or otherwise distributing tobacco products "in or upon any sidewalk, street or other public place for advertising or sales promotion purposes." [1988. Section 714.24, Cincinnati Municipal Code.]
<u>Oklahoma</u>	No state or local laws.
<u>Oregon</u>	Prohibits distribution of free tobacco products to persons under 18 "as part of a marketing strategy to encourage the use of tobacco products." [1989, House Bill 3146. New Section.]
<u>Pennsylvania</u>	No state or local laws.
<u>Rhode Island</u>	No state or local laws.
<u>South Carolina</u>	No state or local laws.
<u>South Dakota</u>	No state or local laws.
<u>Tennessee</u>	No state or local laws.



Texas

No state laws.

. Austin

Prohibits delivery of free tobacco products or the offer to transfer free products "upon any public street, highway, bridge, alley, sidewalk or right-of-way." [1988, Ordinance No. 880218-F. Section 10-5-3(j), Code of City of Austin.]

. Dallas

Requires promoters of special events in city park to obtain "special product permit" in order to have product samples available for "on-premises give away at a specified location and time." Prohibits Park & Recreation Department from co-sponsoring any special events at which "adult-oriented products are given free to the general public and/or sampled by the general public in city parks or park facilities." Defines "adult-oriented products" to include tobacco products, alcoholic beverages and services or entertainment "which may be deemed adult-oriented." [Dallas Park Board Special Events Policy.]

Utah

Prohibits distribution of tobacco products "without charge" except to adults "at professional conventions where the general public is excluded" and "to persons of legal age upon their purchase" of tobacco products. [1989, House Bill 51. Section 76-10-112 Utah Code Annotated 1953.]

Prohibits distribution of smokeless or chewing tobacco "without charge." [1986, House Bill 154. Section 76-10-111, Utah Code Annotated 1953.]

Vermont

No state or local laws.

Virginia

No state or local laws.

Washington

No state law.

. Battle Ground

Prohibits distribution of free sample products "in any setting." [1989, Ordinance 643.]

. Clark County

Prohibits distribution of free sample products "in any setting." [1989, Ordinance 1989-10-05.]

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Washington, cont'd.

. Vancouver

Prohibits distribution of free sample products "in any setting." [1989, Ordinance 2844.]

West Virginia

No state or local laws.

Wisconsin

Prohibits providing tobacco products "for nominal or no consideration" to persons under age 18. Allows a local government to adopt a measure regulating conduct in this section "only if it strictly conforms to this section." [1988, Act 336. Section 134.66, Wisconsin Statutes.]

Wyoming

No state or local laws.

District of Columbia

No laws.

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### Niche Marketing (3/90)

#### 1. \*Smoking Is Not The Cause Of Excessive Illness Or Mortality In Minorities.

- According to a study, released in February 1990 and conducted by the Centers for Disease Control, the high rate of premature deaths among black Americans is the result of so many different variables that even if high quality health care were equally available to both races and incomes were equal, 31 percent of the gap in mortality rate ratios would remain. Researchers found that differences in income alone accounted for 38 percent of the mortality rate gap. Another third of the gap could be accounted for by adjusting for six risk factors including blood pressure, cholesterol level, weight, alcohol intake, smoking and diabetes. Smoking proved to be no more significant a factor than any of the others.<sup>1</sup> The remaining 31 percent of the gap could not be explained at all.<sup>1</sup>

#### 2. \*Minority Populations Have More Pressing Health Concerns:

- 0 "Blacks are twice as likely to die in infancy as whites".<sup>2</sup>
- 0 In 1986, the <sub>3</sub>death rate among black men was 50 percent higher than for white men.
- 0 "Influenza and pneumonia caused 28 of each 100,000 deaths among black men, far higher than the 18 per 100,000 rate posted for white men."<sup>4</sup>
- 0 "Although homicide ranks 12th among all causes of death, it takes nearly as many lives as accidental injuries for black males who die before age 65."<sup>5</sup> "A minority male born today faces a 1 in 38 probability he will die a murder victim, a product of a 34 percent jump in the murder rate in the last 20 years...."<sup>6</sup> The typical American faces a 1 in 177 chance. Therefore, a black male is four times more likely to be murdered as a white.
- 0 According to a report, "Troubling Trends: The Health Of America's Next Generation," conducted by the National Commission to Prevent Infant Mortality, "The most recent statistics available indicate that in 1987 the gap between the black and white infant mortality rates was the widest recorded since reporting of these data began in 1940." Currently, infant deaths are twice as high for blacks as for whites.

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<sup>1</sup>Otton, M. W., et al., The Effect of Known Risk Factors on the Excess Mortality of Black Adults in the United States," JAMA, Feb. 9, 1990.

<sup>2</sup>"US Health," AP Newswire, March 15, 1989.

<sup>3</sup>Ibid.

<sup>4</sup>Ibid.

<sup>5</sup>Ibid.

<sup>6</sup>UPI International, January 12, 1989.

According to Former Senator Lawton Chiles, Chairman of the Commission, "A review of the last decade alarms us that in the 1990s we may see more infants die per year than the 40,000 we now lose before their first birthdays."

- 0 "AIDS is hitting blacks and other minorities proportionally harder than whites because the disease is spreading fastest in this country among intravenous drug abusers, whose ranks are heavier in minority populations than among whites."<sup>8</sup>

3. \*Minorities Are Just As Capable Of Making Rational, Informed Choices.

- Commenting on tobacco advertising in minority media, Dr. Benjamin L. Hooks, Executive Director of the NAACP, argued:

"Over the past several months, increased attention has been focused on advertising by tobacco companies in minority publications and on billboards in minority neighborhoods. Charges have been made that these companies are specifically targeting minority communities because they offer a tempting target and are more likely to be persuaded by the advertiser's message than the majority community. Buried in this line of thinking, and never really mentioned by these critics, is the rationale that Blacks are not capable of making their own free choices and need some guardian angels to protect their best interests. This is an insidious form of paternalism. Blacks, like the rest of the populace, can make the choice of whether to smoke or not ...Let me make it clear that I am not advocating that anyone smoke. However, I believe that African Americans have the right, just as everyone else, to make that choice on their own."

- According to the President of the National Association of Hispanic Publications, Tino Duran, "cigarettes and alcohol are legal products that many Hispanic readers choose to purchase. But that's not a reason for discrimination."

He added:

"You don't hear cries of outrage over housewives being 'targeted' by detergent makers, or yuppies being 'exploited' by exposure to American Express commercials. Why is that? Because, unlike Hispanics, nobody would dare suggest that those people need to be 'protected' from advertising."<sup>10</sup>

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<sup>7</sup>"Black Infant Mortality Rate Is Double That of White Infants," Health News Daily, March 1, 1990.

<sup>8</sup>"U.S. Life Expectancy Climbs Overall But Declines For Blacks," Reuters, March 15, 1989.

<sup>9</sup>Outdoor Advertising Association of America Newsletter, January 1990.

<sup>10</sup>AP Newswire, March 1, 1990.

- Caroline R. Jones, the founder and president of Caroline Jones Advertising believes the whole concept of target marketing is being discredited. "...marketing is targeting. Everyone should target. ...Different ethnic groups spend their money differently, based on accessibility, price, sophistication, knowledge of brand names and the deal offered. You can design a program to sell more to different groups, but only if you admit that there are differences."<sup>11</sup>
- Gary Wilcox, Associate Professor at the University of Texas, argues, "...manufacturers have a right to advertise their brands as long as tobacco is a legal product. If we let the government tell industry not to target groups of consumers, where does that stop? Big Brother is trying to tell society what to do." He also said that banning sponsorship of sporting and cultural events would impose financial hardships and would not be effective anyway.<sup>12</sup>
- At a hearing before the Subcommittee on Transportation and Hazardous Materials, on March 1, 1990, Representative Alex McMillan (R-NC) said, "[I]f a cigarette company targeted their products to an upper-income, white WASP male audience between the ages of 45 and 55, would there be the clamor that we see here today? Of course not. Everyone assumes that that target market has the intelligence and the discretion to make the choice about whether or not to smoke themselves. But let the target be a minority group or women who watch "Roseanne" or go to tractor pulls and automatically there are those people on the anti-smoking side who allege that they are victims and that these people do not have the intelligence or the wisdom to make their own decisions about whether or not to smoke. What an insult. The fact is the complaints do not come from those people who are targeted but from anti-smoking zealots who use them to achieve their own agenda."<sup>13</sup>
- Scott Ward, Ph. D., commented at the Subcommittee on Transportation and Hazardous Materials, on March 1, 1990, "One would suppose, to listen to some antismoking advocates, that minorities and women topple like bowling pins when exposed to cigarette advertising. In fact, minorities and women are no more susceptible to cigarette advertising than white males."<sup>14</sup>

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<sup>11</sup> Rothenberg, R. "The Stresses in Marketing to Minorities," New York Times, March 9, 1990.

<sup>12</sup> "Researcher Says Ad Bans Not The Way To Discourage Tobacco Use," UPI, February 26, 1990.

<sup>13</sup> Testimony of Alex McMillan before the Subcommittee on Transportation and Hazardous Waste, Energy and Commerce Committee, March 1, 1990.

<sup>14</sup> Testimony of Scott Ward, Ph. D., before the Subcommittee on Transportation and Hazardous Waste, Energy and Commerce Committee, March 1, 1990.

- Responding to an accusation that cigarette advertising aimed at minorities is discriminatory, Dewitt Helm, president of the Association of National Advertisers, stated, "Segmentation is not synonymous with discrimination. Segmentation is a positive way to reach a segment of the market with information which may be of special interest to it. Discrimination denies information to a segment of the adult market because the government believes some people need special, separate protection."<sup>15</sup>

4. \*Zoning Laws And Other Regulations Contribute To The Perceived Problems.

- The placement of billboards has been heavily regulated since the early 1960's, when the Highway Beautification Act, which put restrictions on where billboards could be placed along federally funded highways, was passed by Congress. According to the Tobacco Merchants Association (TMA) there are more than 500 localities across the country ban all types of billboards and hundreds of others have severe restrictions on size, placement, etc. These restrictions and zoning laws prohibit the placement of billboards in "high rent" districts leaving little choice to advertisers but to select older, heavily travelled and commercial neighborhoods. Unfortunately, these areas are also ones where lower income, minority groups are concentrated, which contributes to the perception that tobacco billboards are targeted at inner city minority groups. The connection is incidental, not intentional.

5. \*The Advertising Industry Has Already Addressed Any Concerns.

- In June of 1989, the Outdoor Advertising Association of America (OAAA) adopted an industry code of practices relating to the advertising of tobacco products on the advertising outdoor medium. The following are excerpts from the code:

- "The OAAA strongly supports the right to advertise lawful products and believes that any attempt to restrict Freedom of Speech must be considered carefully."
- "OAAA member companies discourage the placement of alcohol and tobacco advertisements that may excessively target any specific segments of the population."
- "OAAA member companies are encouraged to avoid placing alcohol and tobacco advertisements on outdoor displays contiguous to schools and places of worship."<sup>16</sup>

<sup>15</sup>Irman, David, "Are Advertisers Making Big Money by Undermining Black Consumers' Health and Values?," The Courier-Journal, March 17, 1990.

<sup>16</sup>Outdoor Advertising Association of America

## COUPONING (3/90)

### STATUS

There are three ways customers can obtain a manufacturer's coupon:

1. point-of-sale (POS)
2. through the mail
3. via print media

The tobacco industry has two specific procedures to prevent youth from obtaining coupons:

#### 0 For Coupons Obtained At Point-of-Sale Or Via Print Media

- 1) Certification of age - On coupons distributed via print media or at retail, there is a statement to the effect that the coupon is limited to adult smokers.
- 2) Redemption - For redemption of all coupons, the customer must meet the legal minimum age requirements for purchase at retail. Verification is incumbent on the retailer.

#### 0 For Coupons Obtained Through The Mail

- 1) Certification of age - Anyone obtaining a coupon by mail must certify and sign a statement to the effect that they are adults before a coupon is sent to them.
- 2) Redemption - For redemption of all coupons, the customer must meet the legal minimum age requirements for purchase at retail. Verification is incumbent on the retailer.

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#### SUMMARY ARGUMENTS

1. **Proposals To Ban The Use And Redemption Of Coupons Are Based On A Lack Of Understanding Of How The Process Works And What Precautions Are Taken To Insure That Minors Do Not Receive The Product.**  
As a matter of long-standing policy, the tobacco industry discourages those below the legal minimum age from smoking. All reasonable and responsible precautions are taken to insure that those below the minimum age do not redeem cigarette coupons.
2. **Banning An Industry's Use Of Couponing To Protect Those Who Obtain Coupons By Misstating Their Age Is A Perversion Of Justice.**  
In the instances where someone below the legal minimum age does obtain a coupon through the mail, it means they have purposely misstated their age because they would have had to sign a statement which is untrue. Moreover, the ultimate responsibility for a minor's behavior rests with their parents, not with private or public-sector decision-makers. In fact, in these isolated instances where a minor has received a coupon, the industry appreciates and encourages contact from parents who say their child fraudulently obtained coupons. In these cases, the child's name is removed from any future mailings where coupons or other items are available.
3. **There Is No Evidence To Suggest That Coupons Are Used Disproportionately By Those Below The Legal Minimum Age.**  
Marketing techniques such as couponing are directed at current adult smokers and are designed to encourage brand switching or introduce new brands to the smoking public.
4. **Banning The Use Of Couponing By Cigarette Manufacturers Is Regulation Of The Worst Kind.** It is intrusive, it would not address the alleged problem it is supposably designed to affect, and in discriminating against one particular legal commodity, it sets a dangerous precedent.

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## Advertising Deductibility (3/90)

### STATUS

Anti-tobacco legislators have proposed reducing or eliminating the tax deduction for tobacco product advertising, which is currently 100% of advertising expenditures. They believe this is a way to curtail the advertising of tobacco products without an outright ban, thereby skirting constitutional concerns. It is argued that removing the deductibility of advertising expenses will have an effect on the overall consumption of cigarettes and other tobacco products.

### Federal Legislation

Three bills are pending at the federal level:

- o HR412 - WEISS (D NY-17) - "Smoking and Health Advertising Act of 1989" - Eliminate tobacco advertising or promotional expenses as a business tax deduction unless anti-smoking and anti-tobacco counter-advertising funding by manufacturer exceeds 5% of original deduction for taxable year.
- o HR1544 - STARK (D CA-09) "Internal Revenue Code of 1986, Amendment" - Eliminate tobacco advertising or promotion expenses as a business tax deduction.
- o S. 776 - BRADLEY (D NJ) "Internal Revenue Code of 1986, Amendment" - Eliminate tobacco advertising expense as a business tax deduction.

### State Legislation

Prior to 1989, only two states considered legislation relating to advertising deductibility, Iowa and Minnesota. In 1990, legislation was introduced in four states:

- o California bill A3865, introduced by Rep. Bates (D), would disallow deductibility of advertising expenses for alcoholic beverages and tobacco products for purposes of state income tax. [Pending in committee]
- o Florida bill H1631, introduced by Rep. Holland (R) would deny state corporate income tax deductibility of expenses for advertising and promotional activities for tobacco products and alcoholic beverages. [Pending in committee; Senate companion bill S1856 was defeated]
- o Iowa bill S7, introduced by Ray Taylor (R) would deny expenses for advertising of cigarettes as deductions from state corporate income tax. Would take effect for tax year beginning 1/1 after enactment. [Defeated]
- o Senator Leichter (R-ME) is currently drafting a bill that would disallow deduction from state corporate income tax expenses for advertising of tobacco products in periodical publications or billboards.

## SUMMARY ARGUMENTS

- 1) **Tobacco Is A Legal Product.**  
Proposals to suppress the paid speech of tobacco are discriminatory and illegal. Tobacco product advertising is a lawful activity. It is conducted in accordance with relevant federal regulations and is entitled to the protection all commercial speech enjoys.
- 2) **Advertising Does Not Induce The Public To Smoke.**  
Advertising promotes one brand of a product already used by a consumer over another brand. It does not significantly extend overall consumption in mature consumer markets. The President's Council of Economic Advisors stated, "There is little evidence that advertising results in additional smoking." The International Advertising Association recently conducted a five country study that showed smoking among young people is higher in many places where advertising is banned or restricted than where it is not.<sup>1</sup>
- 3) **Taxpayers Do Not Subsidize Cigarette Advertising.**  
It is perverse logic to assume government is somehow entitled to all individual and corporate income except that portion that it allows taxpayers to retain. To argue that the people of the country subsidize any product or group through tax deductions assumes that the government is the rightful owner of the society's wealth. It is the taxpayer who provides the government with revenue, not the government which allows the taxpayer to retain a portion of income to which it would otherwise be entitled. To assume otherwise is to assert that all the income in the U. S. is really the government's not the taxpayers' who earned it.
- 4) **Small Businesses Would Be Hurt Most And Big Business Helped.**  
Limiting the deductibility of advertising expenses would have a more significant negative impact on smaller businesses than on larger businesses. Small firms need advertising to promote new brands over established ones. A limitation on advertising deductibility will make it more difficult for new small businesses to obtain a sufficient market share.
- 5) **Consumers Have A Right To Information.**  
Eliminating the deductibility of advertising will reduce advertising expenditures. The government is effectively influencing consumer choice by restricting the flow of truthful information about a lawful product. Using the tax system to control free speech and consumer behavior sets an ominous precedent. Almost all products have some group who claims they are bad and should be suppressed.

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<sup>1</sup>"A Constitutional Analysis of Proposals to Disallow Tax Deductions for Tobacco Product Advertising Expenses," Covington & Burling, 1987.

6) **Economic Impact Is Substantial.**

The net economic impact of eliminating the deduction was estimated in 1986 by Wharton Econometrics<sup>2</sup> to be:

- an initial job loss of 222,000, amounting to more than 600,000;
- a cumulative loss in output of \$92 billion in 1985 dollars;
- a cumulative loss in real disposable income per household of \$626 in 1985 dollars

7) **Most Advertising Expenses Are A Part Of Sales.**

Most advertising is designed to generate current sales and revenue, which is subject to taxation as ordinary income. Therefore, advertising expenses should be deductible as part of the cost of sales.

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<sup>2</sup>"The Macroeconomic Costs of Limiting the Deductibility of Advertising Expenses," Wharton Econometric Forecasting Associates, 1986.

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